COMMENTARIES

ON

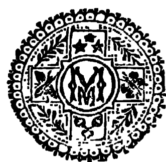
THE LIBERTY OF THE SUBJECT

AND

The Laws of England

RELATING TO

The Security of the Person.



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CHAPTER VI.

PROTECTION OF THE BODY AGAINST WANT AND DESTITUTION.

Necessity of a poor law as part of municipal law.—In a well-arranged system of modern municipal law subjects must find place, not according to the order in which they became fully developed, and in which they entered the page of history, but according to the matter dealt with, the wants supplied, and the evils proposed to be overcome. In this view the poor laws must always occupy a prominent position in every code of civilised nations, though they are nearly the latest of all to make their appearance and to attain maturity and a settled condition. They profess to deal with a problem, which lies at the basis of society, and of the life of every individual, yet which is too abstract a question for the mind of barbarism. In thinly-peopled countries legislatures have neither the experience nor the time nor the occasion to think about what becomes pressing and irresistible only when population grows dense, employments multiplied and subdivided, business intricate and complicated. When the chances and mischances, the successes and failures of life—age, disease, misfortune, climate, blight, and pestilence trample down whoever in the crowd happens for an instant to fall out of the ranks or to lose a footing, then it is that society is confronted with a new difficulty and a new right, which is nothing less than the liberty to live. Property, which at first is but another name for the means of bodily subsistence, can only be

acquired by unremitting care on the part of a vast majority of the human race. It may be lost by the vicissitudes of life as easily as it was won. Those who toil and deny themselves during the struggle are not easily induced to part with their possessions to others, whom they neither know nor approve, nor care for; and out of all the scrambles and collisions among overcrowded citizens, each seeking above all things his own good, not a few are left without the very means of sustaining life. These victims of misfortune find themselves hemmed in on every side by terrors of the law, and arrangements fixed and settled before they were born, and which cannot be altered. They dare not when starving help themselves to food within their reach, for that would be to steal; they cannot insist upon employment, for that would be tyranny to employers; they cannot command or influence friends, for that would be persecution or importunity. Their poverty may be often without the dignity of misfortune, often without the taint of misconduct or of folly, but as often, both these failings may be combined; and still the question remains, whether such persons have nevertheless the right to live and cumber the ground. As Pym said, it is time enough to settle rules to live by, when we are sure to live.[1] If the poorest of the poor are entitled to live, then the question arises—by what rules, under what conditions, and by what machinery are the fortunate, the prosperous, the meritorious, the struggling possessors of means to be restrained from spending all upon themselves, and compelled to surrender just enough and no more than will suffice for the necessities of the poor? This is a problem, which our common law did nothing to solve, and about which it was silent. But a legislature, ever vigilant to find out the weak points and omissions of the common law, has brought to bear upon its solution a vast variety of thought continued for many genera-

[1] Forster's Pym, 142.

[2] BENTHAM well said of the necessity of a poor law: "Few resources except daily labour—always near to indigence—always liable to fall into the gulf from accident—revolutions of commerce, natural calamities, disease; infancy exists before the powers to work exist, decays of old age cause the retreat of those powers. Poverty and death are the centre towards which inaction alone makes the lot of

and complicated provisions, which are constantly improving, which are confessedly still far from perfect, and always needing repairs, yet pre-eminently confused and inaccessible to the knowledge of those very classes, who are most affected by them. The poor and those who are always hovering on the brink of pauperism are altogether without the means of comprehending how they stand under the tangled labyrinth of statutory law dealing with their lives, their rights, and their liberties; and if it were not for the humanity, and the charity, and considerateness now pervading the ranks of society above them, they never could be sure how far the prospect of bettering their condition was even open to them. The poor laws, though nothing more than the answer to the simple problem above stated —how to prevent the destitute from perishing at the least expense, and with the least smart to the rest of the community—have grown under the experiments of successive generations of legislatures, piecemeal, without system, sequence, or connection; and no pains has been taken by the legislature to inform those most concerned, what such laws in the end amount to. It is therefore incumbent on those who aspire to comprehend this voluminous chapter of municipal law to address themselves to it with becoming patience, for without this any adequate knowledge of its contents is wholly unattainable. Yet this knowledge vitally concerns one-twentieth part of the entire population directly, and nearly all the rest more or less directly, inasmuch as all that is given to the one class is taken from

every mortal to gravitate. Man can only rise by continual efforts, without which he will fall into this abyss, and often the most diligent, the most virtuous, slide into it by a fatal declivity, or fall into it from inevitable reverses. The motive to labour and economy is the pressure of present and the fear of future want."—1 *Benth. W.* 314.

WHITBREAD, in 1807, told the House of Commons, that the poor laws were the most interesting propositions that ever occupied the attention of any deliberative assembly upon earth, and the most difficult of all political problems. The speculations of human wisdom had been confounded, and the pride of man humbled by their history and result.—8 *Parl. Deb.* 866.

HALLAM said it must always be a hard problem to discover the means of rescuing those, whom labour cannot maintain, from the last extremity of helpless suffering. -1 *Hall. Const. H.* 80.

the other classes.[1] To the former this knowledge is part of that relating to the security of life; to the rest it relates more to the security of property; but the former being the end, and the latter only the means, the poor laws thus form part of that division of the law entituled the "Security of the Person." The liberty to live is always more important than the liberty to acquire and enjoy that property which supplies the means of living.[2]

Poor laws are a natural burden on property.—The mode of relieving the poor is thus closely connected with the security of property, which is the only fund of relief on which to draw till want is sufficiently assisted.[3]

[1] The paupers were reduced from six per cent. in 1849, to three-and-a-half per cent. in 1874.—2 *Pike on Crime*, 421. Professor FAWCETT said some years ago, that the statistics show, that about one in twenty in England is a pauper; one in twenty-three in Scotland, and one in seventy-four in Ireland. The difference is said to be traceable to the vicious practice of out-door relief, which is so liberally accorded in the two former countries and so rigorously doled out in the last. In England the out-door paupers were to the in-door paupers as eight to one; in Ireland, as one to five.—*Fawcett, Poor Laws.*

[2] The philosophers have discussed the question how far one who enters into the bonds of society, which is built largely on the foundation of property, thereby alienates or sacrifices his self-preservation; and they have resolved that he does not thereby sacrifice it. Thus, they say, that though the paupers have no personal right to take the property of their neighbours, yet this founds a duty in the state to make some provision, whereby the two duties of protecting property and of self-preservation are reconcilable.—*Grotius, De Jure*; *Puffend. De Off.* b. ii. c. 11; b. iii. c. 6. The Code of Frederick the Great declared this duty of the state. —*De Tocqueville. Soc. Fr.* note vi. MONTESQUIEU said, that the state owes to every citizen subsistence, a proper nourishment, convenient clothing, and a kind of life not incompatible with health.—*Montesq.* b. xxiii. c. 29.

[3] ARISTOTLE says, that some think the first object of government is the regulation of property, as this was the source of all seditions, and that Phaleus, the Chalcedonian, was the first who proposed the plan, that the fortunes of the citizens should be equal. And he thought this could be secured by compelling the rich to give marriage-portions to the poor. That Plato limited the fortune of one citizen to not more than four times the portion of each; that Solon had the same idea; and that the Locrians, with a like view, forbade men to sell their property, unless they could prove that some notorious misfortune had befallen them. All these schemes Aristotle, like many philosophers after him, treated as impracticable, because the desires and wickedness of man are alike insatiable.—*Arist. Pol.* b. ii. c. 8.

LOCKE may be selected as the exponent of the civilisation of the

Difficulty of poor law lies in machinery.—That some kind of provision must be made by the prosperous for the poor, in order to save the latter from perishing by starvation, is almost self-evident. The difficulty has been in discovering the least objectionable mode of achieving this result. The fulness of the earth must in some way be made to supply the bodily wants of all; and yet numerous other tendencies and instincts of human nature must be considered in the machinery. To allow even a starving man to help himself out of the first and readiest property which comes in his way would lead to constant war, bloodshed, and irritation: and therefore a circuitous mode of satisfying the needy and despoiling the rich must be invented, by which bounds may be set to the rage of hunger, and balm be poured into the wounds of those, whose property, which is their life-blood, is taken for this laudable end.

It has been said that all poor laws are grossly unjust, because they tax the industrious to feed the idle and profligate.[1] But it has been aptly answered, that, if there were no such tax, it would merely shift what ought to be the common burden of all to the shoulders of the few who are always considerate and humane.[2]

It has moreover been argued, that certainty of parochial assistance, whatever may happen, and whether a man be

moderns on this cardinal doctrine. "God, the Lord, and Father of all, has given no one of His children such a property in his peculiar portion of the things of this world, but that he has given his needy brother a right to the surplusage of his goods, so that it cannot justly be denied him when his pressing wants call for it: and therefore no man could ever have a just power over the life of another by right of property in land or possessions; since it would always be a sin in any man of estate to let his brother perish for want of affording him relief out of his plenty. As Justice gives every man a title to the product of his honest industry and the fair acquisitions of his ancestors descended to him, so Charity gives every man a title to so much out of another's plenty as will keep him from extreme want where he has no means to subsist otherwise; and a man can no more justly make use of another's necessity to force him to become his vassal by withholding that relief God requires him to afford to the wants of his brother, than he that has more strength can seize upon a weaker, master him to his obedience, and with a dagger at his throat offer him death or slavery."—*Locke on Gov.* b. i. chap. 4, tit. 42.

[1] Kaimes, Hist. of Man. [2] 1 Eden, Hist. of Poor, 358.

virtuous or vicious, industrious or idle, removes all concern and all anxiety about his future subsistence, makes him careless and indifferent, paralyses the sinews of labour, and deadens the wholesome desire to better his condition. On the other hand, it is urged, that the provision of the poor laws at most can only remove the horror of perishing by famine, and somewhat alleviate the sorrows of sickness and the pangs of disease. Why should this generous, humane, and benevolent provision of a last resort for the helpless incite to idleness or vice? Is it more pleasing to be compelled to work in another's house than in one's own—to be coerced into taskwork than slowly and laboriously to accumulate a fund for one's own disposal?

Standard of comfort for paupers.—On a memorable revision of the main details of the poor law in 1834 Lord Brougham thus stated one of the cardinal maxims of this part of the law:—"Surely if ever there was a doctrine more frantic in principle than another or less likely to prove safe in its appliances, it must be this, that in defiance of the ordinary law of nature the human lawgiver should decree, that all poor men have a right to live comfortably, assuming to himself the power of making every one happy at all times—in seasons of general weal or woe. The fundamental rule is, that they who toil should not live worse than those who are idle. The knowledge that a fixed fund is known to exist leads the administrators to abuse it, and teaches the poor who calculate upon receiving it to forsake every habit of frugality. Parish allowance is far worse than any dole of private charity, because it approaches in the mind of the poor to the idea of a right."[1]

Mosaic and other early laws as to the poor.—The practice of begging seems not to have attained sufficient importance to require any legislation in the time of Moses. Yet there were a few indirect provisions in his code for mitigating the evils of poverty.[2]

[1] Ld. Brougham, L. C. 25 Parl. Deb. (3rd ser.) 218, *et seq.*

[2] The recurrence of the sabbatical year every seventh year, when all the fruits of the earth were free to all comers—the produce of the fields, the gardens, and the vineyards being absolutely surrendered to all indiscriminately, was at least a means of supply for the time being.—*Lev.* xxv. 5, 6; *Michaelis*, Arts. 74, 128. The right to glean

In China it is said that the poor were effectually provided for, partly by the strict enforcement of families living together, and those who are destitute being provided for by the magistrates of their native city or district.[1] And a singular practice as to begging as a settled mode of relief, was also encouraged and winked at.[2]

Difficulties of the ancients as to paupers.—How to deal with the poor and secure them against starvation, may be supposed to have been a standing difficulty in every epoch of history; and more especially wherever population has

in the fields was also allowed to the poor.—See *post.* The poor were also considered in their compulsory income-tax, called the second tenths and second firstlings, which were partly contributions towards feasts, and partly for distribution among the poor. The stranger, the widow, and the orphan, were entitled to be invited to share in the abundance of those occasions. *Deut.* xii. 5—19; xiv. 22—29; xvi. 10, 11; xxvi. 12, 13. Maimonides said it was a law, that, if any person refused to give alms, or gave less than became him, the assembly should take his goods before his face, even on the sabbath eve.—*Maim.* ch. vii.-x.

[1] Staunton, Code 93.

[2] Travellers relate, that though in China no public or systematic provision existed for the poor, there was an organisation among them, and the beggars had their kings, who assigned them badges. The possession of a badge entitled the holder to knock at any door or enter any shop, and make a disagreeable noise with sticks, till they received the smallest coin of the realm; but they could not be turned out without this acknowledgment.—1 *Perry's Japan*, 292. The beggar king assigned a district to a certain number of his tribe; and some of the residents commuted for their exemption from the annoyance of the rattlesticks by paying a fixed sum.—*Ibid.* 293.

Among the Incas of Peru the duty of assisting the poor and distressed was also provided for by law, for when the time of tilling the fields came round, the village officer mounted a tower, and blowing a trumpet, proclaimed that all the prosperous should first assist the poor to till their fields before attending to their own.—*Com. of Incas*, b. v. c. 2. One reason assigned for there being no beggars in Peru was that every child was obliged to work for its bread at the age of five.—*Barr. Stat.* 538.

The Talmud also taught the duty of the rich to give alms to the poor; but this was viewed not as a good in its effect on the giver, but as a means of restoring the divine order of the world and distributing more evenly the goods of life among all the members of the elect nation. Equality of enjoyment was for some reason deemed a good in itself.

The old Scandinavians had a law by which a poor man could insist on being boarded with one farmer after another in his own township, and it was a penal offence to refuse him this hospitality.—*Magn. Kon. Lag. Bet.*

been crowded within narrow limits. If it be interesting to know what the ancients said and did, and how they grappled with so familiar a subject, there will be found nothing in modern civilisation to contrast so favourably with ancient notions and practices, as the way in which we, and in which they, addressed themselves to this inevitable task.

It is sometimes said, that where slavery prevails, a poor law is unnecessary. The want, indeed, of any definite and organised provision for paupers in ancient states, as Athens, Sparta, and Rome, is partly accounted for by the fact, that classes were divided into freemen and slaves, and slaves, with whom every rich man was surrounded, performed the works of agriculture, which have always been a fruitful source of poverty. But it has been asserted, that the freemen, who fell into indigence, were entitled as of right to relief from the state. In Athens those who were mutilated or sick, and were not possessed of three *minæ* were allowed a daily sum out of the public revenues.[1] The far-sighted part of the ancients, indeed, saw the absurdity of haphazard largesses and distributions of corn or property to the idle and dissolute, irrespective of the exertions of the recipients. Aristotle said it was like pouring water into a sieve; at the same time he seemed to commend the practice of the Tarentines, who relieved the poor out of the abundance of the rich.[2]

[1] Meursius, Attic Lect. b. vi. c. 5; Suidas. The ancient nations and tribes seem to have got rid of the difficulties of supporting paupers, as STRABO has observed, first by infanticide, and at a later stage by the practice of sending forth, with suitable outfit, parties of hardy youths to seek new settlements and push their fortunes.—*Strabo*, (ed. Ox.) 359; *Dion. Halic.* b. i. ARISTOTLE says, the Carthaginians resorted to the latter expedient.—*Arist. De Rep.* b. ii. c. 11. And these in time, if they prospered, became colonies, more or less holding relations of amity with the mother country; otherwise they were lost in the bush.

The people of Cea went further, and made a law, that every person above sixty, if he had not the means to live, should be poisoned, so that others might live.—*Strabo*, b. 10.

PLATO, with all his sagacity, could think of nothing better to do with the poor than to expel them. He said, "Let there be no beggars in our state; and if anybody begs, seeking to collect a means of livelihood by perpetual solicitations, let the local officers turn him out, and send him over the border, that so the country may be rid of such a plague."—*Plato, De Leg.* b. 11.

[2] Arist. De Rep. b. vi. c. 5; Cic. De Off. b. ii. c. 19. Augustus also

The Romans seemed to have more trouble than the Greeks, because of the larger populations concerned. But they never attained to any higher and firmer ground than that of distributing corn among the indigent, either gratuitously or at low fixed prices.[1] And one of the popular artifices of ambitious men naturally took the form of conciliating the poorest and noisiest of the mob by the liberality of these distributions. Julius Cæsar, it is said, reduced to one-half the 320,000 recipients formerly on this free list.[2]

saw the bad effects of indiscriminate distributions of corn.—*Suet. Cæs. Aug.* Who could fail to see the folly of Nero, during festivals, scattering fowls, pictures, gems, clothes, gold and silver, for the people to scramble for?—*Suet. Nero.* Athens and Rome at last found it necessary to tax the possessors of property not only to feed, but to amuse the poor. Bread and sports went together—"*Panem et circenses.*"

[1] Gibb. Decl. R. c. 31.

[2] "This distribution of corn soon became the leading fact of Roman life. Numerous officers were appointed to provide for it. A severe legislation controlled their acts, and to secure a regular and abundant supply of corn for the capital became the principal object of the provincial governors. Under the Antonines the number of the recipients had considerably increased, having sometimes, it is said, exceeded 500,000. Septimus Severus added to the corn a ration of oil. Aurelian replaced the monthly distribution of unground corn by a daily distribution of bread, and added moreover a portion of pork. Gratuitous distributions were afterwards extended to Constantinople, Alexandria, and Antioch, and were, probably, not altogether unknown in smaller towns. This gratuitous distribution of corn ranked with the institution of slavery and the gladiatorial exhibitions as one of the chief demoralising influences of the empire. It being merely a political device had no humanising influence upon the people; while being regulated simply by the indigence, and not at all by the infirmities or character of the recipient, it was a direct and overwhelming encouragement to idleness. With a provision of the necessities of life, and with an abundant supply of amusements, the poor Romans readily gave up honourable labour; all trades in the city languished; every interruption in the distribution of corn was followed by fearful sufferings; free gifts of land were often insufficient to divert the citizens to honest labour, and the multiplication of children, which rendered the public relief inadequate was checked by abortion, exposition, and infanticide."—2 *Lecky, Hist. Mor.* 78-80.

"Besides the distribution of corn several other measures were taken to support the poor. One was the purchase of land in order to divide it among the poor citizens, and this was practised by Julius Cæsar, Nerva, and Septimus Severus. Legacies to the people, public baths open for a trifling payment, popular education, and the support of the children of poor parents, were other means. A

Christianity gradually drew attention to the poor.—Constantine made a decree, whereby children whom their parents were unable to support should be clothed and fed at the expense of the state, a policy which had already been pursued on a large scale by the Antonines.[1] From the age of Constantine an organisation of public charity, combining the efforts of the church and state, was initiated for the relief of pauperism, and hospitals, poor houses, orphanages, and similar establishments were richly endowed.[2]

How the church provided for the poor.—The care of the poor was notably affected by the Christian religion and its gradual diffusion. Christianity alone could elevate the national mind to the abstract duty of finding some relief for the poor as a class; and the first idea seems to have been to endow liberally the church, and make that the

systematic effort to support poor children was first made by Nerva, who enjoined this support, not only in Rome, but in all the cities of Italy. Trajan greatly extended the system; and in his reign 5,000 poor children were supported by the government in Rome alone, and similar measures, though on what scale is unknown, were taken in the other Italian, and even African cities. Private legacies were also often given to the support of the poor. Public hospitals were probably unknown before Christianity, but there were private infirmaries for slaves, and also, it is believed, military hospitals. Provincial towns were occasionally assisted by the government in seasons of great distress, and there are some recorded instances of private legacies for their benefit."—2 *Lecky, Hist. Mor.* pp. 80, 82.

[1] Cod. Theod. b. ii. tit. 27, § 1.

[2] The means of checking infanticide suggested the first outline of a poor law, A.D. 315, to provide maintenance and clothing for the children of parents who were unable to support them.—*Cod Theod.* xi. 27, 1. The emperor in A.D. 322 extended a similar provision in favour of more mature children, who were in danger of being sold by their parents on the ground of inability to support them, the local authorities being enjoined to make an allowance, for the emperor thought it repugnant to Christian morals that any man should be permitted by the state either to die or commit a crime from starvation.—*Cod. Theod.* xi. 27, 2. The early jealousy exhibited in the Roman jurisprudence towards the acquisition of property by ecclesiastical and other corporations was relaxed in favour of goods left by a dying man for the worship of certain honoured gods.—*Ulpian, Fr.* tit. xxi. 86. And Constantine, in 321, extended the same exception to gifts to the Christian clergy, it being then expressed as a reason that whatever was entrusted to the clergy was given to the use of the poor and needy.—*Constantinus*, l. i. *C. de Sacr. Eccl.; Theod. Cod.* xvi. 2, 4.; *Ib.* xvi. 2, 14. Justinian ordered the able-bodied poor to be set to work.—*Nov.* 80, c. 5.

medium of ministering to this great social want. From this consideration also probably sprung those liberal benefactions to the church, which soon converted tithes from a voluntary gift into a legal burden, levied not only on land but on income.[1]

[1] The novels of Justinian declared the clergy to be the administrators of every form of public charity, and accountable to the bishops. —*Justin. Novell.* cxxxiv.; *De Sanct. Episc.* c. 23. The Emperor Anastasius also prohibited the alienation of the property of churches, monasteries, and establishments for the relief of the poor.—*Anast.* c. i. 2; *De Sacr. Eccl.* xvii. Even the fines imposed on the clergy were for some centuries after Christianity became the established religion of the state applied not to the imperial treasury, but to the relief of the poor.—*Cod. Theod.* xi. 36, 20; C. i. 4, *De Episc. Audient.* 2; 2 *Justelli, Bibl. Jur. Can. Vet.* 1273; *Cassiod. Var.* viii. 24, p. 136; *Pashley on Paup.* 142.

The origin of tithe as an institution among Christians seems to have grown out of the relation which the clergy held as almoners of the poor rather than as ministers of religious rites, and both St. Jerome and St. Augustine found the duty of giving tithes to the clergy mainly on their paramount obligations towards the poor, and the redemption of captives.—*B. Hieron.* (382 A.D. *letter*). *St. Augustine*, quoted in *Selden on Tithes*, c. iv. § 4; *Erasmus, De Rat. Concion.* lib. i. p. 843 (ed. 1704); *Pashley on Poor*, 144; *Concil. Antioch.* can. xxv. And ultimately the clergy claimed this contribution as a divine right, discharged of its original fiduciary character. At one stage the income of the church was viewed as having a fourfold appropriation, namely, for the maintenance of the bishop, of the clergy, of the poor, and of the fabric of the church.—*J. H. Boehmer, Jus Parochiale*, vol. ii. p. 11; *Selden's Works*, vol. iii. p. 1120. And theological writers described this as only a continuation of the practice of the apostles who made distribution unto every man according to his need.—*Acts* iv. 35. And so late as the Council of Trent, a bishop was viewed as having, by virtue of his office, the oversight and control of the administration of relief to the poor.—*Concil. Trident.* sess. 22, cap. viii.

"The exuberant charity of the church led to great evils, in multiplying mendicants and impostors. Valentinian, in the fourth century, made a severe law, condemning robust beggars to perpetual slavery. The monastic system consecrated mendicancy, and by ascribing merit to simple almsgiving, immeasurably multiplied beggars. Saints wandered through the world begging money, that they might give to beggars, or depriving themselves of their garments, that they might clothe the naked, and the result was a deadly canker corroding the prosperity of the nation. Withdrawing multitudes from all production, encouraging a blind and pernicious almsgiving, diffusing habits of improvidence through the poorer classes, fostering an ignorant admiration for saintly poverty, and an equally ignorant antipathy to the habits and aims of an industrial civilisation, they

English poor in the middle ages.—In England the church also gradually saw its opportunity of doing something for the poor who were left uncared for by ancient commonwealths, except so far as the precarious and demoralising distributions of corn superseded other relief. It was not, however, till the sixth century that any settled method of providing this relief was agreed upon. Gregory the Great informed Augustine that it had become a custom with the church to give a fourth part of the oblations of the faithful to be distributed among the poor. The confessional of Archbishop Egbert had also directed all priests to exhort their penitents "to be zealous in almsgiving, in attendance at church, and in the giving of tithes to God's church and the poor."[1] And clerks were even required under the penalty of excommunication to bestow all their superfluous possessions on the poor.[2] And during fasts all men were charged to distribute the untasted dishes among God's poor.[3] The abbeys and religious houses seem to

have paralysed all energy and proved an insuperable barrier to material progress. The poverty relieved has been insignificant compared with the poverty they have caused. Notwithstanding the noble services of the Catholic Church in alleviating pain and sickness it has created more misery than it has cured."—2 *Lecky*, *Hist. Mor.* 100.

"During the middle ages the clergy maintained their status as administrators of pauper relief, though tied down by no definite rules, and amid the huts of a miserable peasantry and the castles of a ferocious aristocracy, they served in their religious retreats to mitigate the inequalities of fortune, and prevented society from becoming disintegrated into two savage hordes, the one consisting of beasts of burden, and the other of beasts of prey."—1 *Macaulay*, *Hist.* 8.

The only countries in Europe where from the first the church had no part in relieving the poor were Sweden and Norway.—*Emminghaus*, *Introd.*

[1] 2 Thorpe, 132. [2] Penitentiale Theodori, xxv. 6 (ed. Thorpe); 2 Eccles. Inst. pp. 404-5, ed. Thorpe.

[3] In Egbert's penitentiary part of the spoils of war and of the fines paid to the church was also directed to be devoted to the poor.—2 *Thorpe*, 232; 1 *Thorpe*, 328. Every church and monastery had its *xenodochium*, *hospitium*, or refectory, for the houseless and the wayfarers; and the reeves or bailiffs were directed to feed and clothe one poor man each by collecting contributions of meal and bacon from the surrounding farms.—1 *Thorpe*, 196. Lands were also occasionally left by the faithful to supply doles to the poor on certain days.—*Cod. Diplom.*, No. 226, No. 694. The clergy were the agents in administering all these miscellaneous funds.—2 *Kemble's*

have kept open house, and one of their early grievances arose out of the habit of the great going there with their men, horses, and dogs, for free entertainment, which greatly impoverished the foundation.[1] And it was made an article of impeachment against Wolsey, that he had laid so many impositions on houses and places of religion, that they could no longer afford to relieve the poor, and hence vagabonds, beggars, and thieves abounded.[2] The king also had a regular officer, who acted as grand almoner, and had like functions,[3] and to whom all goods of felons and deodands were assigned as of course to maintain the fund,[4] and who also sometimes held lands of the crown as tenant *in capite*,[5] or collected settled alms as part of the king's revenue.[6] Even so late as 1610 it was decided, that two of the reasons why the statute 21 Henry VIII. c. 10 required incumbents to reside on their benefices were, first, hospitality, and second, the relief of the poor; and these were to be done in the parsonage house, which is the free alms of the church.[7] In the 39 and 40 Elizabeth, a bill for the relief of the poor out of impropriations and other church livings was proposed, but lost.[8] And the same idea of remitting the poor entirely to the charge of the church was revived in Queen Anne's time, and a learned author observes, that, if the plan had been adopted, it would have effected a great saving to the country.[9]

How far monasteries and abbeys supported the poor.— Some writers, including Dugdale, Adam Smith, and Blackstone, attribute the origin of the English poor law to the suppression of the monasteries by Henry VIII., but seventy years elapsed from the one event to the other, and, as Barrington observes, the effect of monasteries in the present day can be traced with ease and accuracy, and no such adequacy of support to the poor results. It rather appears

Anglo-Sax. 511. Ethelwulf directed that every ten hides of land should provide for one poor man or stranger.—2 *Kemble's Anglo-Sax.* 481; 1 *Stubbs*, 237. The laws of King Ethelred contained a general injunction that the people shall comfort and feed God's poor.—*Anc. Laws, Ethel.* § 46.

[1] Stat. Westm. 1st; 3 Ed. I. § 1. [2] 1 Parl. Hist. 495. [3] 1 Inst. 94 a. [4] Rymer Fœd. tom. vi. par. i. p. 8. [5] Domesday Book, Midd. 130 b.; Leic. 231; Warw. 244, &c. [6] 1 Madox, Exch. 348 (ed. 1769). [7] Canning v Newman, 2 Br. & Golds. 54. [8] D'Ewe's Journ. 561. [9] 1 Eden, State of Poor, 264.

that such institutions, instead of satisfying the needy, only breed pauperism indefinitely.[1] The monasteries held about one-fifth of the land of the kingdom, and through granting easy leases, they did not enjoy more than one-tenth of the value.[2]

How far villeinage affected the poor.—The Great Charter contained no direct provision for the poor as a class, nor any recognition of the duty of supporting them. But there was a clause which stated, that villeins were not by the imposition of any fine to be deprived of their carts, ploughs, and implements. At that time indeed the villeins were described as attached to the soil, and upon a sale passed, with the other chattels of the farm, to the purchaser, as negroes have in later times passed with a sugar-plantation.[3] The maintenance of villeins would thus fall on the owner of the stock, in the same way as his cattle. A class of vagabonds who lurked in highways and hedgerows seem to have been recognised by the statutes of Edward I. as those who caused the frequent robberies, murders, burnings, and thefts of that time.[4] Yet the Mirror says that it was ordained that the poor should be sustained by the parsons, rectors of churches, and by the parishioners, so that none should die for want of sustenance.[5] But the machinery by which this was to be done was not indicated.

English legislation from Edward III. to Elizabeth.—The solution of the problem, as to which is the best form of poor law, may be said to have occupied five centuries, for the process of discovery is still going on. There have been during that long period many stages to reach—many blunders to undo—many devious and fruitless efforts—many short-lived experiments. The course by which the legislature has slowly felt its way is a standing lesson to rebuke those who believe that there is any divine origin of laws, and to confirm those who feel, that law and legislation are only a series of crude experiments. It teaches

[1] 22 Edin. Rev. 187; 1 Hall. Const. H. 80. [2] 1 Hall. Const. H. 69. [3] 43 Hen. III. c. 23; 1 Eden on Poor, 7, 35.

[4] 13 Ed. I. A canon of 9 Edward I. 1281, recognised the duty of non-resident rectors to provide for the necessities of pauper parishioners. And dispensations for non-residence were granted on condition of part of the proceeds of the benefice being distributed in like manner.—*Lyndwood*, 132; 2 *Gibson, Codex*, 885.

[5] Mirr. c. 1; 3 Inst. 103.

how little insight the most practical minds of each generation displayed as to this chronic difficulty of social life. If the later generations have succeeded, this is due, not to their own intuition, but to their profiting by the failures of their predecessors. They seem to have in this way attained to riper wisdom than could be elicited from the imperfect guesses after truth by the Cokes, the Hales, and even the Pitts. It is thus salutary to trace a few of the steps by which from the time of Edward III. to Elizabeth, and thence to Victoria, the idea matured of collecting from the prosperous classes above, a fund to distribute among the classes below them, consisting of the poorest and most destitute.

The thoughts and practices of the ancients and mediæval legislatures on the subject of relief to paupers have shown how little method and system they brought to bear on this great practical difficulty. Stealing from hunger is as opposed to the radical rights of property as stealing from ordinary motives of lucre. Gleaning is seen to be also an unsubstantial and unreliable aid against destitution. Sturdy beggars, vagabonds, and disorderly characters are almost instinctively distinguishable from those who are poor by misfortune, or poor by some causes substantially undistinguishable from misfortune, and must be treated separately, and punished criminally. The resources of charity are felt to be too uncertain and unfair. There still remains an outstanding and irrepressible problem. If the poor are entitled to live, that is to say, at the expense of their contemporaries, how and by what machinery is this result to be accomplished—how and from whom are the funds to be collected—on what principle, and where and by whom, and under what conditions and limitations, are these to be distributed?

The Statute of Labourers in 1349 seemed to proceed on the principle, that, if workmen could only be made to attend to their work, and to be content to receive, and employers be content never to give more than, reasonable wages, namely, such as the legislature deemed reasonable, all would go well, and there need be no paupers anywhere.[1] And this policy was enforced for a time by branding on the forehead, or putting in the stocks, absconding servants;[2]

[1] 23 Ed. III. [2] 34 Ed III.; 12 Rich. II.

by prohibiting workmen from wearing fine clothes and eating and drinking better victuals than pertained to them;[1] by preventing poor people begging and charitable people giving alms, except in their native place;[2] by compelling employers to pay, and servants to accept, such wages as the legislature first, and next the justices, from time to time fixed;[3] by fining owners who turned tillage into pasture, and so multiplied mendicants.[4] The legislature in 1530 began so far to recognise the necessity of impotent beggars living somehow, that it authorised them by certificate to beg within certain limits.[5] And in 1535 it even authorised churchwardens to collect some funds to succour poor creatures,[6] and prohibited the charitable from giving alms except into a poor-box.[7] In 1551 the parson and churchwardens were to elect two collectors of alms, who were gently to ask a charitable contribution from every man and woman, and write the same down in a book;[8] and if people refused to give, these were to be exhorted first by the parson and churchwardens, and then by the bishop.[9] If the funds did not suffice, the extra poor were to have licences to beg.[10] At length, in 1562, if a person refused to listen to the parson or bishop, or to contribute, he was to be fined or assessed by the justices, and if he still was obstinate, he was to be committed to prison till he paid his share and all arrearages.[11]

This was the first step towards a compulsory assessment, but the justices were to fix it for each individual, and as yet there was no sound basis of equity on which it rested. In a few years more, beggars above the age of fourteen were sent to gaol and burnt in the ear; and to relieve a sturdy beggar was a penal offence.[12] And an attempt was made to confine relief even among the impotent poor to those who had lived three years in the parish; collectors and overseers were also appointed.[13] The legislature

[1] 37 Ed. III. [2] 12 Rich. II. [3] 12 Rich. II.; 2 Hen. V. c. 4; 23 Hen. VI. c. 12; 11 Hen. VII. c. 2. [4] 4 Hen. VII. c. 19; 25 Hen. VIII. c. 13. [5] 22 Hen. VIII. c. 12. [6] 27 Hen. VIII. c. 25. [7] Ibid. [8] 5 & 6 Ed. VI. c. 2. [9] Ibid. [10] 2 & 3 Ph. & M. c. 5. [11] 5 Eliz. c. 3. [12] 14 Eliz. c. 5.

[13] Ibid. About this period also the funds were supplemented by the growing practice of appropriating to the use of the poor fines imposed on miscellaneous offenders.—23 Eliz. c. 1.

then began to be possessed of the idea, that it was bound to find employment for all who had none, and were willing to work;[1]—a plausible self-imposed duty, which Hale took for granted, and the impracticability of which it took two centuries to discover.[2] Lord Brougham said that this mistaken notion destroyed all provident habits in the working classes.[3] Accordingly, the justices were directed to procure, by taxation of the inhabitants, a good stock of wool, hemp, and stuff to work upon; and houses of correction were to be provided in the background for the refractory. And justices were to appoint four substantial householders to see the poor set to work.[4]

Final settlement of poor law by Elizabeth.—It was in 1601 that the enactments relating to the poor were finally revised, and put in so settled a form, that the act has continued the basis of all the legislation still existing. Four or two overseers were to be elected annually at Easter to raise, weekly or otherwise, by taxation of every inhabitant, a competent sum, to provide a stock of work for the poor who were able to work, and for the necessary relief of the blind, lame, and impotent, who were not able to work. The poor who refused to work were to be committed to the house of correction. Ratepayers who refused to pay were to suffer distraint of their goods, and were entitled to appeal to quarter sessions if they were overrated. Some of the near relatives of impotent poor were to be bound to contribute towards their support. And poor children were to be apprenticed.

Such was the skeleton of the first settled form of the English poor law, to which a great variety of limbs and members have subsequently been added.[5]

[1] Montesquieu, b. xxii. c. 29, *ante, p.* 4. [2] Hale's Disc. on Poor, c. 2, p. 119; 1 Eden on Poor, 155, 168; 1 Campbell's Ch. J. 582. LORD BROUGHAM observed, that even the sagacious Pitt brought in a bill founded on the principle that every poor man was entitled to be made comfortable in his own way, and to be furnished with a cow or a pig, or some animal yielding profit.—25 *Parl. Deb.* (3rd) 218. [3] 25 Parl. Deb. (3rd) 211.

[4] 39 Eliz. c. 3.

[5] 43 Eliz. c. 2. A similar result, that of creating a machinery for levying a poor-rate, was not arrived at in France till near a century later, viz. the ordinance of Lewis XIV., 1662. And it was still later in Germany.

Later legislation as to settlement and removal.—The law thus settled in the time of Elizabeth was considered sufficient if it had only been faithfully carried out; but though justices, overseers, and constables were exhorted and even threatened, if they neglected to do this, it was found necessary in 1662 to define more precisely the settlement of the poor, or to confine the poor to their own parishes, that is to say, those with which they were so closely connected, that they might fairly claim to be exclusively entitled to be maintained there, and to remove others who were not fairly so entitled, or at least send them to other parishes.[1] The Settlement Act, indeed, was thought necessary to prevent the poor acquiring the habits of vagabonds. The previous statutes had merely directed the poor to be sent to the parishes of birth or of the last three years' inhabitancy.[2] This act enabled all new comers into the parish to be removed within forty days as a matter of course, if they had not rented a tenement above ten pounds' value, or could give security. It thus acted as a check on the spirit of adventure and the incentive to industry, which a poor man always finds in trying to better his condition through finding out elsewhere more remunerative employment than what he has yet obtained. The poor man under this new system became little better than a serf, having the option of moving only within a limited area. Yet this Settlement Act recited as its occasion, the complaint of parishes which became overcrowded with poor whom they could not get rid of, the latter being naturally attracted towards the parishes where the best stock was found, where were the largest commons to build on, and the most woods to burn and destroy. But as this first notion of defining a pauper settlement was found too narrow, other grounds of settlement, namely, such as serving public offices, paying taxes, being hired as a servant, were afterwards added.[3] And in 1795 and 1809 a slight improvement was made by not allowing a pauper's

[1] 13 & 14 Ch. II. c. 12.

[2] 12 Rich. II. c. 7; 11 Hen. VII. c. 2; 19 Hen. VII. c. 12; 1 Ed. VI. c. 3; 3 Ed. VI. c. 16; 14 Eliz. c. 5; 39 Eliz. c. 4; 1 Jas. I. c. 7.

[3] 1 Jas. II. c. 17; 3 W. & M. c. 11; 8 & 9 Will. III. c. 30; 9 Will. III. c. 11; 9 Geo. I. c. 7.

removal till the pauper became actually chargeable, nor his removal at all, if he was sick.[1]

Progress of legislation since Elizabeth as to workhouses.— When workhouses were first established, they were believed to solve the chief difficulty connected with the poor. Sir Matthew Hale thought they would enable work to be found for all who were willing to work, so that each might eat his own bread, and thus neither stealing nor begging would be necessary, and so that the gaols would be emptied and that idleness would cease from the land. Moreover, that these workhouses would be able to pay their way, and be sound commercial undertakings. And Locke also had the same impression;[2] while Defoe, with greater sagacity, pointed out, that, by establishing a parochial factory, you merely take from one and give to another, and you put the vagabond in the honest man's employment. The workhouse system suggested an easy mode of getting at and teaching the children of the poor, and in the first local act for the Plymouth workhouse, a school-

[1] 35 Geo. III. c. 101; 49 Geo. III. c. 12. Lord Brougham and many other statesmen (including Pitt and Whitbread before him) suggested a plan for making settlement depend on residence rather than service—a plan which has long worked satisfactorily in Scotland, and was only at last made part of the law of England in 1876.—39 & 40 Vic. c. 61; 25 Parl. Deb. (3rd) 1014.

LORD ABINGER, in 1823, said the law of settlement had placed the whole of the labouring population in a state of hopeless servitude, since it empowered the overseers to remove any man likely to become chargeable. And the law had been the origin of more litigation than any law that ever existed.—9 *Parl. Deb.* (2nd) 703.

ADAM SMITH, in 1776, said, "To remove a man who has committed no misdemeanour from the parish where he chooses to reside, is an evident violation of liberty and justice. The common people of England however, so jealous of their liberty, but like the common people of most other countries, never rightly understanding wherein it consists, have now for more than a century together suffered themselves to be exposed to this oppression without a remedy. Though men of reflection too have sometimes complained of the law of settlement as a public grievance, yet it has never been the object of any general popular clamour, such as that against general warrants—an abusive practice undoubtedly, but such a one as was not likely to occasion any general oppression. There is scarce a poor man in England of forty years of age, I will venture to say, who has not in some part of his life felt himself most cruelly oppressed by this ill-contrived law of settlement."—*Wealth of Nat.* b. i. c. 10.

[2] 1 Eden on Poor, 247.

master was authorised to be part of the staff.[1] The idea of making it compulsory to receive poor apprentices was embodied in an act of 1696,[2] and merchants were authorised to get young apprentices from this source.[3] In 1722 none were to be relieved, if they refused to be lodged and maintained in the workhouse.[4] Though in 1722 the relief of out-door paupers was thus prohibited, it was found that it was too rigorous a rule, and in 1796 it was left to the discretion of overseers, with the approval of the vestry or the sanction of a justice of the peace, to relieve the poor at their own residences in case of temporary illness or distress.[5] And a justice of the peace was authorised at his discretion to order an overseer to relieve a pauper at the pauper's own house for one month on stating the cause for it. This relaxation of the rule as to out-door relief was said to be soon greatly abused. And though the power of one justice to order out-door relief was afterwards extended to three months, and the power of two justices in some cases to six weeks, yet the amount of relief was limited to a small sum per week.[6]

Progress of extension of area of relief to unions.—The project of enlarging the area of relief beyond a single parish, and combining two or more parishes for greater economy, uniformity, and efficiency had long gathered strength. In 1765 a committee of the House of Commons reported in favour of carrying out the scheme.[7] This notion of joining several parishes and having one workhouse under separate officers, called visitors or guardians, and so securing more efficient superintendence, was carried out by Gilbert's Act in 1782.[8] In 1834, however, as will be seen, the idea was still further improved on and adopted all over England, by forming various parishes into unions in a systematic manner.

Change of treatment of paupers in workhouses.—The power of a master of a workhouse to punish a refractory pauper was limited in 1814 to this extent, that he could not punish any adult with corporal punishment, nor could he confine one more than twenty-four hours, but must

[1] 6 Anne, c. 46. [2] 8 & 9 Will. III. c. 30. [3] 4 Geo. I. c. 11. [4] 9 Geo. I. c. 7. [5] 36 Geo. III. c. 23. [6] 55 Geo. III. c. 137. See *post* as to the modern limit of justices' interference. [7] 16 Parl. Hist. 6. [8] 22 Geo. III. c. 33.

charge him before a justice of the peace.[1] And the master was soon after also prohibited from putting any chain or manacle on a sane inmate within the workhouse.[2]

Checking extravagance of outlay by overseers.—Overseers, being supreme in their own parish, were left unchecked, and the greatest variety of treatment was dealt out to the poor. The accounts were practically unaudited till 1810, when two justices were empowered each year to review the disbursements, and disallow those that were excessive.[3] An effective check, however, has not been supplied till very recently. And accurate statistics relating to the amount of poor-rates were not systematically commenced till 1776,[4] though now they are carried to great perfection.

Practice of paupers wearing badges.—In 1691, in order to check the extravagance of overseers, they were required to enter in a book the names of all persons relieved.[5] And in 1696, with a like view, paupers receiving relief were to wear a badge on the right shoulder, under the penalty of imprisonment and whipping; and overseers relieving those who wore no badge were fined twenty shillings.[6] This degrading obligation was, however, repealed in 1810, after a century's experience of its worthlessness.[7]

Reform of English poor laws in 1834.—The growing consciousness, that the poor laws were unsatisfactory in their working, became irresistible early in the present century. Demoralisation, fraud, extravagance, purposeless litigation, vague efforts to keep down expenses and to relieve honest and dishonest misery, convinced all that there was a bottomless abyss into which the money of the rich, the prosperous, as well as of the honest and industrious poor, was thrown, in order to do some good to those still more poor and unfortunate, but that there was little or nothing to show for all the sacrifices made. The disease of idle profligacy and profligate idleness spread like a canker among the working classes; and no man knew how to check it or what limits to put to it, and in what direction to search for the remedy. At length, after many and long-continued inquiries and agitations, a radical

[1] 54 Geo. III. c. 96. [2] 56 Geo. III. c. 129. [3] 50 Geo. III. c. 49. [4] 17 Geo. III. c. 40; 26 Geo. III. c. 56. [5] 3 W. & M. c. 11, § 11. [6] 8 & 9 Will. III. c. 30. [7] 50 Geo. III. c. 52.

revision of the existing laws was achieved, which in turn has since received constant accessions and amendments from the current experience of the day. It is singular that though the people are so closely connected with the poor law, one of the great obstacles to any amendment of that law arose out of their own apathy. Lord Brougham, in moving the great Amendment Act, said the people were more indifferent to it than their own near interest in it and intimate connection with it made desirable.[1]

The epoch of the Poor Law Amendment Act of 1834 enabled a clearer line to be drawn, so as to separate the genuine poor from the dishonest poor, by making relief out of the workhouse less a matter of course. Care was taken to prevent the poor who were content to live at the expense of their neighbours from being more comfortably provided for than the industrious, struggling, and self-reliant poor, who manage to live somehow; and care was taken to prevent anything like harsh and cruel conduct towards any. Above all, a central board was created for the sole purpose of superintending closely and of enforcing a method and uniformity among isolated overseers and guardians. Adequate powers were given to check extravagance, and yet to compel humanity; to see that no poor person should perish from want, and yet that none should be encouraged to live a life of idleness or profligacy; so as to make it always a desirable thing for each to live by the work of his own hands; to distribute the burden of poor rates more equitably; and to provide all kinds of checks against oppression from whatever quarter proceeding. This central board has grown from less to more importance. The funds collected and distributed are great, and the way of arranging the details concerns deeply all classes of the community—the persons who pay and the persons who receive. The supervision of this department of the law, and this administration of revenue, has grown into one of the great departments of government. The head of that department has risen gradually to be a member of the executive government, and has a place in parliament for the sole purpose of vindicating more effectively, and keeping in the best working order, a machinery for overcoming all the difficulties of the day

[1] 25 Parl. Deb. (3rd) 211.

respecting the care of paupers as these arise from time to time.

Gleaning, stealing, and begging, from hunger.—There are three subjects, more or less closely connected with poor laws, and which, nevertheless, are not part of them, which may be disposed of before stating in detail those substantive laws. These are, (1) the right of the poor to glean as a means of satisfying their hunger, (2) the punishment of people who steal from hunger, (3) the right of the poor to beg, and the position of vagrants. These topics necessarily occupy the thoughts of all who consider poor laws; and no municipal law can avoid laying down some rules more or less precise with regard to them.

Right of poor to glean.—Most municipal laws had some rules relating to poor and famishing people before poor laws were adopted. Moses prohibited the owners of fields from reaping the corners of their crops, or from gathering the scattered ears, or fruits of the trees after being shaken, these being reserved as an indirect fund of support to the gleaners.[1] And a traveller could pluck the ears of corn growing near the wayside and eat, though not carry them away; and he was even justified in entering his neighbour's vineyard and eating enough of grapes to satisfy his appetite.[2] And Mahomet also recognised gleaning as a sacred right of the poor.[3] Moreover a Brahmin in his travels when hungry was exempted from fine, if he took only two sugar-canes, or two esculent roots from another's field.[4] By the ancient laws of Wales a poor man, who had traversed a certain breadth of country without obtaining either alms or entertainment, was not punishable though caught with stolen eatables in his possession.[5] And at one time the test of his immunity was, that he had passed twenty-seven houses in three vills without receiving any such entertainment.[6]

The same competency of the poor to glean was once assumed in this country. The people indeed so late as a hundred years ago, relying on their biblical knowledge, claimed the right; though there was no record of any conclusive decision of any court of law or allusion to it until

[1] Lev. xix. 9, 10; xxiii. 22; Deut. xxiv. 19-21; Ruth ii. 2-19. [2] Deut. xxiii. 25, 26. [3] Koran v. 142. [4] 7 W. Jones, 385. [5] Anct. Laws, Wales, 226. [6] Welsh Laws, b. xiv. c. 25.

1788. Lord Hale was reported to have said, that by the custom of England the poor had a right to glean.[1] And Gilbert, C. B., and Blackstone copied this dictum with apparent favour, tracing it to the Jewish law.[2] It was not till 1766 that the point was seriously mooted, when a farmer, complaining of gleaners stealing his barley in the straw by handfuls, charged them before a justice with felony; and the justice committed them to prison. Some champions of the poor then caused an application to be made to the Court of Queen's Bench for a criminal information against the justice for this oppressive conduct, the main ground of complaint being that the right of leasing or gleaning was a legal right. But Lord Mansfield, C. J., said that stealing under the colour of leasing or gleaning was not to be justified; and that the justice had acted rightly. The court said, when the question was raised, the legality of the practice would be determined.[3] Accordingly, in 1788, the point was directly raised in the form of a demurrer to a plea in an action of trespass, the defence being, that the defendant was a poor person and inhabitant of the parish, and that he entered the plaintiff's field to glean. The case was twice argued, and the Court of Common Pleas, by a majority of three judges to one, gave judgment for the plaintiff. The dissenting judge, Gould, J., maintained, that the law of Moses was founded on charity and fit to be received in every country; and that the abuse of the right could always be guarded against as easily as the abuse of other rights, and the poor law acts in no way interfered with the principle; but he admitted that the right was confined to parishioners and to proper times, namely, after the crop had been gleaned. Lord Loughborough, C. J., and other judges, however, composing the majority of the court, repudiated the law of Moses, treating the Mosaic precept as addressed only to the conscience, and decided, that such a right as that of gleaning was too uncertain to be acted on; was inconsistent with the nature of property, which implies an exclusive enjoyment; and that the arguments *ab inconvenienti* showed it to be impracticable to enforce such a law.[4]

[1] Trials per Pais, 534. [2] Gilb. Evid. 250; 3 Bl. Com. 212.
[3] R. *v* Price, 4 Burr. 1925.
[4] Steel *v* Houghton, 1 H. Bl. 51; 6 Camp. L. Ch. 149. As to

Excuse for stealing from hunger.—Another phase of the same idea was how far stealing from hunger should be punishable. Lycurgus allowed hungry men to steal.[1] And the civilians got over the difficulty easily by defining larceny to be the taking of goods for the sake of gain: and hence, if a starving man stole meat to satisfy hunger, he was not within the definition, and so incurred no punishment.[2] It is said in the *Mirror*, that it was owing to petty thefts being often caused by hunger, that Edward I. ordered those convicted of larceny under the value of a shilling to be exempt from capital punishment, as in the ordinary case.[3] Lord Hale, though formally laying down the law, that real poverty is no excuse for theft, was so sensible of its occasional harshness, that he contrived opportunities of relieving the inculpated vagrants as an ease to his conscience.[4] Hawkins, on the other hand, said that the authorities proved, that extreme necessity was an excuse for felony, provided the necessity that induced the invasion of another's property did not arise from prodigality or idleness, or neglecting one's own business.[5] And Lord Bacon, in his Maxims, adopted the opinion of Staundford, and asserted without any qualification, that if one stole viands to satisfy his present hunger, this was not felony or larceny.[6] It is true that Lord Hale denies, that this is the law of England, because no such extreme necessity can exist, at least since the statutory provision for the poor; and because of the manifest insecurity of property, if any man might carry in his own breast a dispensation from the law of property by alleging a necessity, of which, as he says, none but the party himself

references to the Jewish law being used as a guide in English law, see the observations of Bp. Willis in H. L. 1723.—*Atterbury's Case*, 16 St. Tr. 640.

[1] Plut. Lycurg.

[2] Peckius, Ad Rem Naut. 215; Barr. Stat. 478. LORD HALE, in forgetfulness of what had gone on before him, complained that in France and elsewhere, "the Jesuits had made a very bad use of those maxims of natural law by encouraging theft;" the fact being that a French writer simply defined theft as stealing for the sake of gain, and so that hunger did not come within such definition.—*Vouglan's Inst. au Droit Crim.* 553.

[3] Mirror, c. 4, § 16.

[4] Burnet's Life of Hale.

[5] 1 Hawk. P. C. 93, § 20.

[6] Bac. Max. SIR T. MORE seemed also to be of this opinion.—1 *Camp. L. Ch.* 583. It ought, however, to be remembered that in Bacon's time a poor law was not thoroughly established.

can judge.[1] But it has been well remarked, that this last reason loses its weight when one reflects that the reality of the necessity is a question of fact, as easily proved as other facts generally are proved. And though the view taken by Hale is the only satisfactory principle to act upon, yet judges naturally are careful as to the punishment in such cases, and use as much moderation as is compatible with enforcing the general rule.[2]

Begging and vagrancy.—Though the relief of poverty, pure and simple, may be dissociated from the kindred subject of punishing mere idleness, or at least refusing encouragement to it, the two subjects are often intermingled. And idleness, with destitution as its consequence, may be viewed separately as an offence, or if not an offence, at least a ground for some legal restriction or regulation.

Punishment of mere idleness.—It may seem singularly plain and obvious in modern times, that idleness is best left to punish itself, and needs no further notice from the law. The sting of want and the envy of those who enjoy plenty supply an adequate stimulus to work, if none existed before. But the ancient legislatures, true to their self-imposed mission of enforcing the virtues, thought they were bound affirmatively to chastise the indolent, and at least supply a more potent spur to labour than the mere privation of common comforts might engender. They tried many remedies—some mild and some merciless.[3] By

[1] 1 Hale, P. C. 54.

[2] It is related that Rooke, J., commended a jury for finding a hungry little girl guilty of larceny for stealing a small mouthful of food, and he sentenced her to pay a fine of a shilling; but took care to add, that if she had not got that coin, he would give her one for the purpose.—*Foss's Judges.*

[3] The Jews allowed a husband to prosecute his wife, if she refused to weave or spin.—*Seld. Ux. Heb.* b. iii. c. 10. The Egyptians compelled all men to go to the governor every year, and satisfy him how they got their livelihood, under the penalty of death, if they told lies.—*Herod.* b. ii.; *Diod. Sic.* b. i. According to Herodotus, Solon enacted, that the authorities should punish every man with death who could not show a regular industrious mode of life.—*Herod.* ii. 177; *Diod.* i. 77. According to Pollux, idleness was punished at Athens by Draco with atimy or civil disfranchisement; but Solon mitigated that punishment so as to punish only the third offence.—*Meursius, Solon,* c. 17; *Areop.* c. 8, 9. And if a father had not taught his son some art or profession, Solon relieved the son from all obligation to

a law of Athelstan, if a person refused to work or to go to service, any person might seize him as a rogue and make him work[1]—a law which, it will be seen, was after many centuries tried in England once more. And in Scotland Kenneth III. ordered the idle to be imprisoned, while Macbeth ordered them to be yoked like oxen, and to draw carts.[2]

Begging and vagabondism from Edward III. to Anne.—When the Statute of Labourers was passed in the time of 23 Edward III., it became apparent, that some kind of relief must be given to the poor; but the moment this was seen to be inevitable, it was also seen, that, if begging and vagabondism were to be allowed without check or discrimination, it would be futile to make any settled arrangements for all who were indigent. The King of Cyprus, when on a visit to England in this reign, was robbed on the highway, and this made a suitable impression on the

maintain him in his old age.—*Plutarch*, *Solon*, 22-24. The ancient Sardinians also compelled idle persons to account for their idleness.—*Aelian*, b. iv. c. 1. And so did the Argi.—*Alex. ab Alex.* b. ii. c. 13.

The Court of Areopagus at Athens had jurisdiction to summon persons suspected of having no visible means of livelihood, and when two poor students incurred this stigma, they had to subpœna the miller, whose corn they ground by night, to prove that he gave them a share of corn for wages, sufficient to enable them to study by day.—*Athen.* b. iv. c. 19. Diogenes Laertius gives a similar anecdote as to Cleanthes.—*Diog. Laert. Cleanth.* And Herodotus traces this jurisdiction to the practice of the Egyptians above mentioned. Socrates indeed pointed out that such a law was inconsistent with liberty.

At Rome, Numa cautioned indolent cultivators of the soil that the censor would punish them.—*Plut. Numa.* A law of Gratian authorised beggars to be seized, if able-bodied, and made slaves to the informer.—*Cod. Theod.* b. xiv. tit. 18. And Justinian made it an indictable offence to be idle.—*Nov.* 80, c. 10; *Cujac. in expos.*

A Chinese emperor used to repeat the observation, that when any one in his empire passed a day in idleness, some one or other of his people suffered hunger or cold in consequence.—2 *Du Halde*, 497. And in China it was a criminal offence for an owner of lands not to keep up their cultivation, and not to see his mulberries and hemp properly attended to.—*Staunton, Code*, 103. The Incas appointed special judges to try the idle.—*Com. Inc.* b. vi. c. 35. And with them it was an offence punishable with stripes, for a man not to irrigate his own lands.—*Ibid.* b. v. c. 14.

[1] Wilkins, 56. [2] Hect. Boet. b. xi. fol. 225; b. xii. fol. 251.

legislature.[1] Accordingly the legislature set itself soon after to get rid of the valiant or sturdy beggars, that is to say, people with strong appetites and good constitutions, but gifted with an unfortunate indisposition towards work of any kind and a strong proclivity towards crime of every kind—being always ready to act on the latter impulse whenever and wherever it would help them to live an easy or luxurious life at the expense of other people. To put down this class and reduce them to orderly, industrious, and peaceable habits became a serious undertaking of the legislature; and its mode of trying to effect this purpose and suppress begging deserves to be here noticed, as it has perplexed the legislature more or less almost to the present day.

The courts had already punished idlers who haunted taverns.[2] But the Statute of Labourers prohibited giving of alms, and committed at once to gaol all servants who asked high wages. Other statutes soon directed absconding servants to be branded in the forehead.[3] Vagrants were put in the stocks till they found sureties.[4] The sheriff and justices were ordered even to search for vagrants and put them in the stocks, and keep them there on bread and water.[5] Gypsies were ordered to quit the realm in sixteen days, otherwise to be put to death as felons.[6] At last some impotent poor were authorised by certificate to beg; while the idle were stripped naked to the middle and whipped at the cart's tail till they returned to their own parishes.[7] Sturdy vagabonds had the gristle of the right ear cut off.[8] Next they were branded with the letter V, and adjudged slaves for two years to any person who would take them; they were to be beaten and chained, and if they sought to escape, they were to be branded on the cheek with the letter S, to wear an iron ring round the neck, to be slaves for life, and on a second offence to be put to death as felons.[9] Soon afterwards the impotent were prohibited to beg openly, but might get licences to beg in definite places

[1] Hume's Hist. Eng. [2] 17 Ed. II. [3] 34 Ed. III. [4] 12 Rich. II. [5] 11 Hen. VII. c. 2; 19 Hen. VII. c. 12. [6] 22 Hen. VIII. c. 10; 1 & 2 Ph. & M. c. 4; 5 Eliz. c. 20. [7] 22 Hen. VIII. c. 12. [8] 27 Hen. VIII. c. 25. [9] 1 Ed. VI. c. 3; 3 & 4 Ed. VI. c. 16.

on condition of wearing a badge.[1] Lastly, under Queen Elizabeth, all above fourteen found begging were to have a hole burned through the right ear, and persons giving alms to sturdy beggars were fined twenty shillings.[2] In 1597, previous statutes were repealed, and all sturdy beggars were to be stripped naked and whipped till they reached their native parish. Coke seemed to praise this statute for getting rid of the rogues that formerly swarmed, and only regretted that the laxity of officials so soon afterwards caused them to reappear.[3] And vagabonds pretending to be soldiers and sailors were declared felons.[4] Again in 1603 beggars and incorrigible rogues were to be branded with the letter R, and if found again begging were to suffer death as felons; and the king by proclamation directed them to be banished to Newfoundland, the Indies, or anywhere else.[5] And the justices were directed by the statute to make a periodical search by night for these rogues and vagabonds, and commit them to the house of correction—a practice which continued also during the time of Queen Anne.[6] The establishment of houses of correction in 1609 had the effect of considerably diminishing the evils of sturdy begging, and a privy search was to be made by justices twice a year in the night-time.[7] The introduction of the law of settlement in 1662 had the same tendency;[8] as likewise the practice of erecting workhouses towards the end of the same century.[9] Indeed rogues and vagabonds were regularly hunted at one time, and rewards of two shillings per head were actually authorised to be paid by justices to those who succeeded in catching them.[10] And the privy search for them directed to be made by justices during the night shortly before each quarter sessions resembled a badger-hunt.[11]

Final separation of rogues and vagabonds from paupers.—At length, in 1744, the time arrived for making a more marked separation from paupers of all those who were rogues and sturdy beggars. These were then divided into three classes. First, beggars and those refusing to work

[1] 2 & 3 Ph. & M. c. 5. [2] 14 Eliz. c. 5. [3] 39 Eliz. c. 4; 2 Inst. 729. [4] 39 Eliz. c. 17. [5] 1 Jas. I. c. 7. [6] Ibid.; 13 Anne. c. 26. [7] 7 Jas. I. c. 4. [8] 14 Ch. II. c. 12. [9] 1 Eden on Poor, 247; 6 Anne, c. 46; 9 Geo. I. c. 7. [10] 14 Ch. II. c. 12. [11] 13 Anne, c. 26.

for wages or to keep in their own parishes were committed to the house of correction. Secondly, gypsies, fortune-tellers, and pretended soldiers were to be imprisoned or whipped. And thirdly, rogues who had escaped from prison, or refused to obey justices' orders, had a longer term of imprisonment along with whipping. But justices were still charged with the duty of making a privy search, so as to root out these pests of society.[1]

Begging now a penal offence.—As begging and its evils led originally to the foundation of a poor law, it was a necessary consequence that such persons should be treated as idle and disorderly who adhere to that mode of life. By the Vagrant Act, which was amended and passed in 1825, and is still in force, all persons wandering abroad or placing themselves in any public place, street, highway, court, or passage, to beg or gather alms, or causing or procuring or encouraging any child or children so to do, are liable to be committed to gaol.[2] This enactment strikes at the root of all begging in public places, and though beggars were the subjects of penal enactments for centuries, as has been noticed in the history of the poor laws, the subject was not reduced to this simple form until 1744, of which the last-mentioned act is merely a re-enactment.

Such an enactment as that of 1825 is justified, and justified only, as supplementary to a poor law, that is to say, a systematic administration of relief, at the expense of the whole community, to all persons whatsoever who are in a starving condition. As such a system of poor relief has been established since the time of Elizabeth in England, it was absolutely necessary to prohibit other modes of obtaining such relief, and especially that which consists in mere begging by strangers, which all history and experience show is nothing but a special tax on the humane and the weak-minded—which flourishes chiefly by imposture and fraud, and which has none of the safeguards usually accompanying a systematic and just dispensation of relief by public taxation.

It may be noticed, however, that though all begging in public places is now a penal offence, there is nothing in

[1] 17 Geo. II. c. 5.

[2] 5 Geo. IV. c. 83, § 3. The justices may rely on their own estimate as to the age of the child.—R. *v* Viasani, 31 J. P. 260.

the enactment which interferes with private begging, or that kind of solicitation which constantly goes on in all communities, by which the weak seek the aid of the powerful in support of the innumerable enterprises of business, pleasure, or charity. No law can possibly intercept the development of this tendency to give and take, which seems common to all stages of civilisation, and even to the rudest forms of society. And it may be added that no punishment is now incurred by those who choose to give alms, however foolishly, to anybody and to everybody.[1]

Vagrants and vagabonds classified.—There are other classes of persons who are also hovering on the verge of pauperism, and molest society in a more offensive manner, and who are punishable more severely, under the denomination of rogues and vagabonds. Such are persons who pretend or profess to tell fortunes, or use any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on people.[2] This enactment applies to gypsies and others who resort to this popular art of flattering the ignorant and unwary under the guise of predicting future events, and which beguiles the recipients into giving money either as a reward or a fee. But, whatever other remedies may exist, it will not affect those who profess to read one's character by examining the lines of the hand,

[1] Prohibitions against begging are now probably universal throughout Europe, though the punishments prescribed vary considerably. —*Emminghaus, Introd.*

In many Catholic countries severe measures were taken to grapple with the evil of mendicancy, and Pope Sixtus V. in the sixteenth century set himself against it. Charles V. in 1531 issued a severe ordinance against beggars in the Netherlands, but excepted from its operation mendicant friars and pilgrims.—2 *And. Hist. Com.* 55. Lewis XIV. was equally severe in France. In Spain begging began to be put down about 1520. It was not till the eighteenth century that the philosophers fully discussed and analysed the leading evils of indiscriminate almsgiving, Locke, and Defoe, and Berkeley guiding English opinion.

The French Convention, in 1793, decreed that every person convicted of having given to a beggar any species of relief whatever should forfeit the value of two days' wages, to be doubled on a repetition of the offence. But this decree, which was not more severe than our statute of Elizabeth, was soon reversed, and never renewed.

[2] 5 Geo. IV. c. 83, § 4.

or by tricks of legerdemain, and stratagems savouring of fraud.[1] Where persons wander abroad and endeavour by the exposure of wounds or deformities to obtain or gather alms, this is deemed a still graver offence, and they are liable to be committed for three calendar months. And the same punishment is allotted to those who go about as gatherers or collectors of alms, or who endeavour to collect charitable contributions of any nature or kind, under any false or fraudulent pretence.[2] The kind of false pretence here lastly referred to has, however, been held to mean something in the nature of a false representation of an existing fact, and not to apply to a representation of a merely disputable fact or grossly absurd representation, such as the power to abstain from food for several months or years.[3]

Idle wanderers are treated as vagrants.—Moreover every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself or herself, is liable to be committed for three calendar months.[4] The words here used "not giving a good account of himself" being vague, leave it to the good sense and practical judgment of the justices of the peace to say whether those words apply. And it requires much nicety to steer evenly between extreme views. Wherever a man or woman seems to avoid regular employment of any kind, and has no honest means of earning a livelihood, the inference is all but irresistible, that plunder and dishonest courses are relied upon for a precarious subsistence. Though the law does not lay it down to be the imperative duty of all persons who have no means of livelihood to work for a livelihood, it assumes that this is and ought to be the desire of all; and if a person will not work voluntarily, or accept work when offered, and yet will not enter a workouse so as to secure the means of life without plundering his neighbours, the

[1] Monck v Hilton, 6 Feb. 1877, Exch. D. [2] 5 Geo. IV. c. 83, § 4.
[3] R. v Cavanagh, 1 Dowl. N. S. 546. A clause giving justices power, to order vagrants to be whipped, was struck out in 1824.—11 *Parl. Deb.* (2nd) 1086.
[4] 5 Geo. IV. c. 83, § 4.

justices can have little difficulty in being satisfied, that these persons do not give a good account of themselves, and must be content to take the punishment provided for them by this enactment.

Unlicensed pedlars are treated as vagrants.—There are also other persons who are generally so near the verge of pauperism that they are treated in a similar manner and committed for a month to gaol. The statute has so treated every petty chapman or pedlar wandering abroad and trading without being duly licensed or otherwise authorised by law. It will be seen hereafter, that pedlars and hawkers, with some exceptions, require a licence or certificate in order to justify their gaining a livelihood by frequenting people's houses in order to sell goods, and they expose themselves to the risk of this summary commitment by not providing themselves with the authority which the law requires. And indeed, even though pedlars have obtained a certificate as required by law for their vocation, this alone will not exempt them from the provisions of the Vagrant Act, if otherwise they offend against it.[1]

Other idle and disorderly persons as vagrants.—Besides the classes of fortune-tellers, unlicensed hawkers and pedlars, public beggars, paupers returning from their settlement, vagrants sleeping in sheds, already referred to, there are some others, classed under the same heads of idle and disorderly persons or rogues and vagabonds, or incorrigible rogues respectively, and treated accordingly, namely, prostitutes, parents refusing to maintain their children, or running away and deserting their wives and families, persons indecently exposing themselves in public places, or exposing indecent pictures or prints, playing at games in public places, arming themselves with offensive weapons, being found on premises for an unlawful purpose, or in streets and public places with intent to commit felony, or found in possession of housebreaking implements. These latter classes and their offences are noticed more particularly under the heads of law to which they belong, but there are some incidents relating to their apprehension and punishment which require to be noticed in this place, for the Vagrant Act, like many other acts on special subjects, contains matters of procedure more or less peculiar to such

[1] 34 & 35 Vic. c. 96, § 13.

offences, and which enter into the substance of the law affecting those classes of persons.

Under this class of statutes it is worthy of notice, that mere trespassers cannot be treated as vagrants, but only those who are found on premises for an "unlawful purpose." The precise meaning and effect of these words belong more properly to the subject of trespass on property; and it is enough to say that the words "unlawful purpose" as here used mean something quite distinct from the mere act of trespassing, which is in itself only a cause of action. Thus where men are found courting servants without any express or implied permission, this is nevertheless not deemed within the meaning of this statute, "being on the master's premises for an unlawful purpose;" and hence it is unjustifiable to give such men into custody. The utmost that can be done is to turn them out without unnecessary violence.[1]

Vagrants may be apprehended without warrant.—One peculiarity of the Vagrant Act is, that any private person whatever, as well as a constable, has authority to apprehend such offenders without any justice's warrant, provided they are found offending.[2] This expression, "found offending" is however difficult to apply. It necessarily confines the general power of apprehension to those who are detected in the act of committing offences. Several of the offences consist in some visible act, about which there can be no mistake; and hence apprehension is competent in all such offences. Other offences however do not consist in any such visible act. Thus a man, who has deserted his wife and family, whereby they become chargeable to the parish, can scarcely in any circumstances be "found committing" that offence, seeing that such offence does not consist in any one single visible act, as, for example, begging and some other offences do.[3] But a person may be properly apprehended as "found offending," though he has escaped, and is pursued into the neighbouring premises, for a fresh pursuit is a lawful and unavoidable continuation of the act of apprehension.[4] And when a constable apprehends persons charged under the Vagrant Act, he may also take possession of any horse, cart, or vehicle, or goods and bundles then

[1] Kirkin *v* Jenkins, 32 L. J., M. C. 140; Hays *v* Stevenson, 3 L. T., N. S. 39. [2] 5 Geo. IV. c. 83, § 6. [3] Horley *v* Rogers, 2 E. & E. 674. [4] R. *v* Howarth, Mood. C. C. 207.

in possession of the offender; and the justice of the peace may order such offender and his goods and vehicle to be searched. If necessary, these may be sold to defray the expense of the offender's apprehension and maintenance in gaol.[1] And the justice of the peace may also grant a search warrant to search lodging-houses for offenders, if it be sworn they are harboured there.[2] If any person who has been committed to gaol under the Vagrant Act effect his escape, or has been twice convicted as a rogue and vagabond, or has on his second apprehension and conviction resisted the constable who apprehended him, he is deemed an incorrigible rogue, and as such is liable to be committed to gaol till the next quarter sessions is held, when the court may inquire into his case, and may order him to be further committed and kept to hard labour for one year, and if a male to be whipped.[3]

Though any person, who has been convicted under the Vagrant Act may appeal to quarter sessions within the time, and under certain conditions specified, yet if he has been discharged from prison on recognisance, and do not prosecute such appeal, he may be again arrested and committed so as to undergo his original sentence.[4] And one consequence of being convicted under the same act is, that the offender is deemed to become at once chargeable to the parish in which he was at the time residing, and he may be removed accordingly like other chargeable paupers to his place of settlement, whatever it may be.[5]

Modern and settled state of poor laws.—The next inquiry is as to the system established and—so far as anything can be final in what is constantly undergoing revision and improvement—the final arrangements of the legislature for disposing of the claim made by starving persons to that maintenance which humanity dictates. It will be seen how complicated and multifarious are the offices created, the processes devised, and expenditure incurred for enabling just consideration to be given to the case of each individual as it arises. And yet the treatment must be compatible with general rules and a methodical system. The ever-varying circumstances of the cases seem to

[1] 5 Geo. IV. c. 83, § 8. [2] 5 Geo. IV. c. 83, § 13; 1 Leach, 208. [3] 5 Geo. IV. c. 83, §§ 5, 10. [4] Ibid. § 14; 1 & 2 Vic. c. 38. [5] 5 Geo. IV c. 83, § 20.

explain why and how it is, that so much amplitude and detail are required in this chapter of the law.

Division of subjects in poor law.—The subject of relief to paupers divides itself into the following heads:—1. The officers employed in the business of collecting and distributing the funds. 2. The persons entitled to relief and the extent and nature of such relief. 3. The variation of treatment caused by the settlement of paupers. 4. The variation of treatment caused by the removal of paupers. 5. The mode of making and collecting the poor rate. 6. The persons from whom the funds are obtained, and how these contributions are apportioned.

The Local Government Board.—A central board was created in 1834, and has been modified from time to time, passing under different names, and having its duties gradually defined and augmented. The Poor Law Commissioners passed into the Poor Law Board, and the latter was made a permanent institution in 1868.[1] Again, it was in 1871 called the Local Government Board, and was represented by a president appointed by the crown, and holding office during pleasure. Some other members of government are nominally joined as *ex-officio* members of this board, but practically the President of the Local Government Board is the head of his department, which is treated as one of the departments of the government for the time being, he himself retiring from his office along with the cabinet ministers, while the main staff of the department remain in office in the same manner as is usual in the other departments of state. The Local Government Board is not now confined to the superintendence of the officers concerned in the administration of relief to the poor, but exercises power in other matters, which are no longer of a cognate character: such as the laws relating to public health, including vaccination, prevention of disease, and local public improvements.[3]

Powers of Local Government Board.—The power of the central board to make rules was conferred in 1834, and has been largely exercised by the publication of general orders, defining the duties of the various officers engaged in the relief of the poor, such rules being liable to be

[1] 4 & 5 Will. IV. c. 76; 10 & 11 Vic. c. 109; 30 & 31 Vic. c. 106, § 1. [2] 34 & 35 Vic. c. 70. [3] 38 & 39 Vic. c. 55.

disallowed by the Queen in council.[1] This power necessarily comprehends to some extent a control over the conduct of the paupers themselves while maintained in the workhouse, except that the board cannot compel the attendance of paupers at any mode of worship, or cause their children to be educated in any religious creed, to which the paupers object.[2] The jurisdiction of the central board is very extensive, so far as relates to the direction and guidance of local officers. It does not interfere with the general law as to settlement and removal of paupers or the mode of rating property: but as to the propriety of the expenditure of money that is raised by the rates, and which is so vitally affected by the number, remuneration, and conduct of the various officers, paid and unpaid, who are concerned in its administration, the control extends so far, that the sanction of the board is required to the number and payment of such officers. The board may dismiss such officers, at the same time that it is empowered to lay down rules for their conduct. And the board may also prescribe the duties of masters, to whom pauper children have been lawfully apprenticed.[3] But the board has no power to interfere directly with the relief of the poor, as by ordering relief to be given to any individual pauper.[4] Nor can it substantially alter the relations of the subsisting parish officials, except so far as express power is given from time to time.[5] Its action consists in controlling and directing the local machinery with a view to confine that machinery to its legitimate purpose, that of relieving the poor in the most economical as well as liberal manner, having regard to the peculiar circumstances in each locality. These general orders, when relating to the relief of the poor, the management of workhouses, and the guidance of guardians, require, after being made, to be sent to the clerks of justices throughout the country for their information.[6]

When a central board was established, one of its first duties was to form unions of parishes and alter the same, and this power has been applied under great variety of local

[1] 4 & 5 Will. IV. c. 76, § 15; 10 & 11 Vic. c. 109, § 17. [2] 4 & 5 Will. IV. c. 76, § 19. [3] 7 & 8 Vic. c. 101, § 12. [4] 4 & 5 Will. IV. c. 76, § 15. [5] R. *v* Hunt, 12 A. & E. 130; R. *v* Poor Law Com. 17 Q. B. 445. [6] 31 & 32 Vic. c. 122, § 2.

circumstances.[1] One important power also was to order workhouses to be built and provided, certain limits of expenditure being defined for that purpose by the statutes.[2] And the board may now rearrange or subdivide parishes which have detached and outlying portions.[3] Another of the powers of the Local Board is to direct an inquiry into any matter connected with the execution of the duties, and to summon witnesses and examine them on oath.[4] And with the consent of the Treasury, a fit person may be appointed with delegated powers to hold a special inquiry.[5]

Inspectors of poor.—In order to maintain a vigilant superintendence over local administration, the central board may appoint inspectors, who have power to visit and inspect all workhouses and attend meetings of guardians, and to summon and examine witnesses as to any subject-matter within the control of the central board.[6] These officers are the eyes and ears of the central board for the more minute subjects of supervision.

Guardians of the poor, and how elected.—As most of the parishes have since 1834 been combined in unions having a common workhouse, the management of this workhouse and the superintendence of the relief administered to all the poor within the area of the union have been committed to guardians. These guardians act gratuitously, but not compulsorily, and are elected by the owners and ratepayers; and their own interest as ratepayers naturally predisposes them to economy in dispensing relief, for their election being annual and their acts being watched, if any remissness or extravagance be discovered, their services can be readily dispensed with at the next election. They employ paid officers to do the active work of administration, and they themselves are not only controlled indirectly by their constituents, who pay the rates, but are also superintended by the central authority of the Local Government Board, whose consent is necessary to most of the important acts of their administration.

As several parishes and townships usually compose a union, one or more guardians are elected to represent each;

1 4 & 5 Will. IV. c. 76, § 26; 39 & 40 Vic. c. 61, § 11. 2 4 & 5 Will. IV. c. 76, §§ 24, 25; 30 & 31 Vic. c. 106, § 14. 3 39 & 40 Vic. c. 61, § 1. 4 10 & 11 Vic. c. 109, §§ 11, 26. 5 Ibid. § 22. 6 Ibid. §§ 19, 20, 21.

or in case of a large parish, each ward of such parish, as the Local Government Board may determine. The guardian must be rated in some parish within the union to an amount such as the central board may fix, but it cannot fix this at a higher amount than forty pounds of ratable value.[1] And it is a condition that the guardians must not be personally interested by deriving any emolument out of the poor rates.[2] The power of voting by proxy is limited; but no owner who is residing in the parish can vote by proxy.[3] Minute directions for regulating such elections are laid down by the central board in general orders, and the mode is by voting papers.[4] These voting papers are collected from house to house by an officer appointed for the purpose, and any candidate may insist on an agent of his own accompanying such officer in his round.[5] Any malpractices and fabrication or altering of voting-papers are punished by three months' imprisonment.[6] The electors consist of ratepayers and owners.[7] But none, who is, or has been for a year, a pauper, can vote in such elections.[8] The qualification as ratepayer is independent of that as owner; and if a person combines both qualifications, he has double votes. He has plurality of votes according to the amount of his ratable value, the highest number of votes in respect of each ground of qualification being six, and each fifty pounds of ratable value yielding one vote.[9] The office of guardian is one which cannot be thrust upon a person against his will; but if he is nominated, the proper time for refusal is to intimate his wish to the clerk of the guardians during the election, and his resignation at other times for any reasonable cause may be approved by the central board.[10] And a woman, if a widow or spinster, may serve the office. Moreover all justices of the peace, whose jurisdiction includes a union or part of it, are *ex-officio* guardians, and may insist on acting at all times with the elected guardians, and this connection does not disqualify

[1] 4 & 5 Will. IV. c. 76, § 38; 7 & 8 Vic. c. 101, § 18; 30 & 31 Vic. c. 106, § 4; 39 & 40 Vic. c. 61, § 12. [2] 5 & 6 Vic. c. 57, § 14. [3] 30 & 31 Vic. c. 106, § 5. [4] 4 & 5 Will. IV. c. 76, § 40. [5] Gen. Order, 1867. [6] 14 & 15 Vic. c. 105, § 3. [7] 4 & 5 Will. IV. c. 76, §§ 38-40; 7 & 8 Vic. c. 101, §§ 15, 16; 32 & 33 Vic. c. 41, § 7; 39 & 40 Vic. c. 61, § 39. [8] 39 & 40 Vic. c. 61, § 14. [9] 7 & 8 Vic. c. 101, § 14. [10] 5 & 6 Vic. c. 57, §§ 9, 10.

them for acting as justices relating to poor-law matters.[1] If any question arises as to the right to act as guardian, the Local Government Board may settle it; but the other remedies of *certiorari* or *quo warranto* may also, according to circumstances, be resorted to;[2] and if necessary the board may order a fresh election.[3]

Powers and duties of guardians of the poor.—The guardians, when elected, are subject in all their main duties to the control of the central board. These duties as to the administration of poor relief are set out in general orders; and the guardians are bound to confine their action within those directions, except that the central board cannot interfere so as to order the guardians to give relief to any individual pauper.[4] The main discretion as to details is however exclusively confided to the guardians. In transacting business three guardians form a quorum to act at a meeting.[5] And all questions are determined by a majority of the guardians present and voting, the chairman voting with the rest, and having a casting vote in case of equality of votes.[6] But if he sit, though not voting, he will count as one, in case of a dispute as to what is a majority.[7] The guardians require to purchase things necessary for the conduct of the workhouse by tender or contract open to all comers, if the sum exceed fifty pounds.[8] And debts incurred by the guardians are to be paid within the current half-year as a general rule;[9] for as ratepayers come and go, it is unfair to make new comers pay for the debts of their predecessors. For the purpose of their work the guardians are an incorporated body having a common seal.[10] And as they require both to purchase and hold lands for purposes connected with these duties, a summary remedy is given to them to recover possession from intruders and tenants who hold over.[11]

As the guardians are elected for the sole purpose of

[1] 4 & 5 Will. IV. c. 76, § 38; 7 & 8 Vic. c. 101, § 24; 5 & 6 Vic. c. 57, § 15. [2] 5 & 6 Vic. c. 57, § 8; R. v Hampton, 6 B. & S. 923. [3] 30 & 31 Vic. c. 106, § 12. [4] 4 & 5 Will. IV. c. 76, § 15. [5] General Order, 1847. [6] Ibid.; 12 & 13 Vic. c. 103, § 19. [7] R. v Griffiths, 17 Q. B. 164. [8] Gen. Order, 1847. [9] 22 & 23 Vic. c. 49. [10] 5 & 6 Will. IV. c. 69, § 7; 5 & 6 Vic. c. 57, §§ 16, 17. [11] 5 & 6 Will. IV. c. 69, § 5; 59 Geo. III. c. 12, §§ 24, 25.

managing gratuitously the affairs of the workhouse at the expense of the ratepayers, the general principle of such management is, that though they are not required to expend their own moneys in the discharge of their duties, still a vigilant watch is kept over their conduct, so as to confine their expenses to what is necessary and nothing more. They are viewed as faithful stewards for their fellow ratepayers. They are expressly authorised to charge the expense of discharging their leading duties to the common fund of the union.[1] Their travelling expenses also on necessary occasions are for the same reason allowed to them, and reasonable refreshment. And when they are requested, or when it is found necessary and expedient for them to consult with the central board, the deputation expenses of three of their number and their officer are defrayed out of the same common fund.[2] And in order to keep the expenses of guardians within bounds, and to prevent any misapplication or waste of the funds which they have in charge, their accounts are annually audited by district auditors, who are officers appointed at the expense of the consolidated fund of the nation, and whose duty it is to pass no charge which is not expressly or impliedly within the authority of some statute.[3]

Overseers of the poor.—The officers, who, from the time of Elizabeth to the time of William IV., discharged the duty of collecting the rates and administering the proceeds as poor relief, are the overseers; and though their duties and powers have been much restricted since unions of parishes were formed and put under the management of guardians, they still take a part in this business in all parishes, with the exception of those which are regulated by some local act, and for many purposes they are the immediate organs of the parish. When the overseers were first authorised to be appointed by the statute, 43 Elizabeth, c. 2, they were to be four, three, or two substantial householders, nominated every year; and the churchwardens of the parish are also *ex-officio* overseers.[4]

Compulsory and gratuitous office of overseer.—The office of overseer is compulsory, that is to say, if a person is

[1] 7 & 8 Vic. c. 101, § 59; 28 & 29 Vic. c. 79, § 9. [2] Gen. Order, 1870. [3] 7 & 8 Vic. c. 101, §§ 32, 65; 31 & 32 Vic. c. 122, § 24; 32 & 33 Vic. c. 63, § 10. [4] 43 Eliz. c. 2, § 1.

duly appointed and refuse to serve, he may be indicted for misdemeanour and fined.[1] And an unmarried woman is liable to be appointed as well as a man.[2] But though the office is compulsory in the sense above stated, the party may appeal to quarter sessions against his appointment,[3] or the parishioners themselves may do so;[4] and while there is an appeal, the appointment cannot be quashed by *certiorari*,[5] nor can the validity of the appointment be questioned by a *quo warranto*.[6] But if it is unauthorised or subject to some infirmity or want of jurisdiction, there may be a remedy by *certiorari* in order to quash it.[7] And as the office of overseer is compulsory, it was reasonable for the courts or the legislature to exempt certain classes, whose duties were inconsistent with such services.[8] Not only is the office of overseer compulsory, but it is gratuitous, that is to say, no allowance whatever is made to him for the loss of time and for the trouble involved in its duties. He cannot, for example, without some express enactment, charge the parish for making the poor rate, or for making copies of the rate to give to collectors, or for an accountant's services, or for collecting the rates, even though the vestry authorise him to charge a poundage; much less can they allow themselves a salary.[9] Nor could overseers engage and pay an assistant overseer until a statute authorised them to do so.[10] They were not even entitled to hire or purchase a room or house at the expense of the parish for an office to keep their books, until a statute authorised this to be done; and this is allowed only where the population exceeds 4,000, and the vestry and the Local Government Board consent to the expenditure.[11] In such parishes all overseers may now, with the consent of the

[1] R. *v* Jones, 2 Str. 1146. [2] R. *v* Stubbs, 2 T. R. 395. [3] 43 Eliz. c. 2, § 5; R. *v* Great Marlow, 2 East, 244. [4] R. *v* Forrest, 5 T. R. 58. [5] R. *v* D. St. Albans, 3 B. & C. 698; 5 D. & R. 538. [6] R. *v* Daubeny, 1 Bott, 324. [7] R. *v* Standard Hill, 4 M. & S. 378.

[8] Thus peers and members of parliament are exempt, as well as justices of the peace, practising barristers and solicitors, clergymen, dissenting ministers, physicians, surgeons, apothecaries, and others. In general an express statutory exemption must be shown.

[9] R. *v* Guyer, 2 A. & E. 216; 4 N. & M. 158; R. *v* Glyde, 2 M. & S. 323. [10] 59 Geo. III. c. 12, § 7. [11] 24 & 25 Vic. c. 125.

vestry, provide a proper depository for the parish books and documents.[1] And owing to the business of parishes having increased, there has been authorised in certain cases the appointment of officers, called vestry clerks and assistant overseers and collectors of rates, all of whom relieve the overseers of part of the duties, and are paid for their services.

Qualification of overseer as householder.—Though the statute of Elizabeth described the overseers to be substantial householders, this description has been construed to include any person occupying a house merely as a place of business in the parish;[2] and poverty is not a legal objection, if he be a householder.[3] A single overseer may now be appointed for a parish, and even one out of an adjoining parish may, if absolutely necessary, be appointed at a salary paid out of the poor rates.[4] And in all cases the objection, that the person appointed is not a householder, is one which can only be raised by appeal to the quarter sessions.[5] At first, the statute mentioned only each parish as the area for which overseers were to act, and parishes by reputation were included in the authority, so that the evidence in such cases necessarily consisted chiefly in long user.[6] But townships and villages being found in many instances to exist within a parish, which could not be conveniently dealt with as part of the parish, these were put on the same footing as distinct parishes, and authorised to have separate overseers also.[7] Thereupon arose many questions as to what was a township and what was a village. But the distinction was at last confined to such townships or villages, as had separate overseers before 1844, and the mode of treating them as part of a union was settled.[8] And extraparochial places have also been put on nearly the same footing as parishes or have been annexed to parishes.[9]

Appointment of overseers when and how.—The appointment of overseers is directed to take place in each parish on the 25th March, or within fourteen days next after it,

[1] 24 & 25 Vic. c. 125, § 2. [2] R. v Poynder, 1 B. & C. 178. [3] R. v Stubbs, 2 T. R. 395. [4] 29 & 30 Vic. c. 113, § 11. [5] Re Pudding Norton, 33 L. J., M. C., 136. [6] R. v Eyford, 4 Doug. 331. [7] 14 Ch. II. c. 12, § 21. [8] 7 & 8 Vic. c. 101, §§ 22, 23. [9] 20 Vic. c. 19; 31 & 32 Vic. c. 122, § 27.

though an appointment would not be void if the matter were adjourned to a later date.[1] The essential part of the appointment of overseers consists in the nomination by two or more justices of the peace, dwelling in or near the parish, and who may or may not adopt the nomination of the vestry.[2] And in cities or boroughs substantially the same enactment applies.[3] Where a parish is partly in town and country, the justices of either place have the appointment.[4] And it is the majority of the justices present who decide.[5] When the overseers are once appointed, the justices are *functi officio,* and have nothing further to do with the matter, and all objections must be entertained at quarter sessions on appeal;[6] but if they refuse to appoint at all, the Queen's Bench division will compel them by mandamus to do so.[7] Moreover every justice, dwelling in the petty sessional division where such default occurs, incurs a penalty of five pounds.[8]

What relief to poor is now given by overseers.—When the statute of Elizabeth passed, and up to very recent times, the overseers were the only persons who administered relief to the poor, except where local statutes varied the machinery, as they often did in large towns. And it was owing to the singular variance between the discretion exercised in one parish and another, each governed wholly irrespective of the others, that in recent times the demand for restricting this wide discretion became irresistible, and a methodical and uniform treatment was substituted. Now that unions of parishes have been formed since 1834, the primary duty of relieving the poor is transferred to the guardians, with this exception, that, in cases of sudden and urgent necessity, the overseers are not only still entitled, but imperatively required, under a penalty, to give temporary relief, though they must do this, not by giving money, but by giving articles of absolute necessity to the applicant.[9] In order to demand such relief, it is not

[1] 54 Geo. III. c. 91; R. *v* Sparrow, 2 Str. 1123. [2] 43 Eliz. c. 2, § 1; 13 & 14 Ch. II. c. 12, § 21; R. *v* Lancashire, 29 L. J., M. C. 244. [3] 12 & 13 Vic. c. 8, § 1; 15 & 16 Vic. c. 38. [4] R. *v* Butler, 1 Bott, 16. [5] Penny *v* Slade, 5 Bing. N. C. 319. [6] R. *v* Great Marlow, 2 East, 244. [7] R. *v* Gordon, 1 B. & Ald. 524. [8] 43 Eliz. c. 2, § 10; 12 Vic. c. 8, § 2. [9] 4 & 5 Will. IV. c. 76, § 54.

necessary that the poor persons should have a settlement in the parish. Wherever want and necessity overtake them, there they may demand this statutory provision at the hands of the local overseers. Want, indeed, is too urgent to brook any searching about, which requires time, when promptitude is everything.[1]

It has sometimes been thought that overseers should in these matters be controlled by justices of the peace; and once it was so to a great extent. A justice of the peace, however, now has no power, in the first instance, to order relief to any individual whatever out of the rates of the parish.[2] The utmost extent of his power is, that, if an overseer has refused to give temporary relief in a case of sudden and urgent necessity, the justice may order such overseer, under a penalty of five pounds, to give this relief. Yet it must be relief not in money, but in articles of absolute necessity.[3] And this is convenient, owing to the promptitude with which a justice, always on the spot, can be resorted to in such emergencies. And the justice may also, though no previous request has been made to the overseer, order the latter to give medical relief only, to any person, whether a parishioner or not, in case of sudden and dangerous illness.[4]

In one other case, however, namely within a poor law union, if two justices acting for the district think fit, they may by their order direct, that relief shall be given to any adult person, who shall from old age or infirmity of body be wholly unable to work, without requiring that such person shall reside in any workhouse. And in this case one of these justices shall certify in such order, of his own knowledge, that such person is wholly unable to work, and is lawfully entitled to relief in such union, and desires to receive the same out of a workhouse.[5]

And as a further check on the discretion of local administrators, the overseers are obliged in the course of business prescribed by the Local Government Board to report what they do to the relieving officer, and keep certain books, with a view to their whole dealings being subjected to inspection and audit by the proper officers.[6]

[1] 4 & 5 Will. IV. c. 76, § 54; 11 & 12 Vic. c 110, § 2. [2] 4 & 5 Will. IV. c. 76, § 54. [3] Ibid. [4] Ibid. [5] Ibid. §§ 27, 52. [6] Order of 22 Ap. 1842.

Overseers as representatives of parish property.—For the purpose of enabling the overseers to defend more effectually the interests of the ratepayers, they are made by statute the owners for the time being of all goods, materials, and things bought and acquired for the use of the parish.[1] And this is highly convenient in case of litigation. They are moreover the persons to order necessaries, and are all jointly liable for goods ordered in the course of their duty, if they have concurred in the order, or have authorised one of them to act for the whole so as to bind the parish; though, if one overseer act independently of the others, he must, according to the rule of common law, answer for his own acts.[2] Thus an overseer has no business to borrow money for the purposes of the parish, and must abide by his own contracts in such cases. Nor can he in general by his contract render succeeding overseers liable.[3] Sometimes, however, hardships and losses were sustained by outgoing overseers who had become liable in respect of things done during their office, and hence care is now taken that they shall be reimbursed.[4] And to facilitate their dealing with parish property in houses or tenements, a summary remedy for ejecting intruders or tenants holding over is provided by statute, even though a claim of title be raised against the overseers.[5]

Neglect and misconduct of overseers.—Should overseers neglect their duty as defined by the statutes, as by disobeying warrants or orders, a summary remedy is given before justices, who may fine them forty shillings; and in default of paying this amount, or levying it by distress, may commit the offender to prison for ten days, and his only remedy then is an appeal to quarter sessions.[6] Some particular statutes impose a higher penalty for disobeying their enactments.[7] And if the overseers wilfully disobey the order of justices or guardians, or of the Local Government Board, the fine is five pounds.[8] They are also liable to be indicted for not relieving the poor as well as for

[1] 55 Geo. III. c. 137, § 1; 5 & 6 Will. IV. c. 69. [2] Eadon *v* Titmarsh, 1 A. & E. 691. [3] Sowden *v* Elmsley, 3 Stark. 28. [4] 39 & 40 Vic. c. 61, § 29. [5] 59 Geo. III. c. 12, §§ 24, 25; R. *v* Brecknock, 7 B. & S. 902. [6] 33 Geo. III. c. 55, § 1. [7] 17 Geo. II. c. 38, § 14. [8] 4 & 5 Will. IV. c. 76, § 95.

relieving them unnecessarily.[1] Other more serious offences are specially punished. Thus, where an overseer purloins, embezzles, or wilfully wastes or misapplies, the parish moneys or goods, he may be fined by justices twenty pounds, besides being ordered to pay treble the value purloined; but the misapplication must be wilful to justify such a punishment.[2]

Another source of misconduct is that of overseers selling and buying to and for the parish which they represent. Hence, whenever they have, directly or indirectly, supplied goods and materials, not to a pauper, but to the workhouse of their parish for the support of the poor, they become subject to a penalty of 100*l.*, except when the articles could not be got from any other person within a convenient distance.[3] And a like penalty was afterwards extended to guardians or officers of workhouses.[4] If, however, the parish is included in a union, overseers and churchwardens are now relieved from the above heavy punishment, seeing that other checks suffice to prevent misconduct.[5] Yet all officers concerned in administering poor law relief are prohibited, under a penalty of five pounds, from supplying in their own name, or on their own account, goods ordered to be given in parochial relief, or for any money ordered to be given in relief in their own union or parish.[6] And in construing the first of these enactments, it is held no defence that the goods are supplied at a fair market price;[7] nor is it a defence that the goods were supplied to a third person, who contracts with the guardians at a fixed price.[8] And even if one of the partners in business of a guardian, without the knowledge of the latter, supply the goods in the ordinary way of business, the guardian incurs the penalty.[9] At the same time, if the transaction is not for the profit of the overseer or guardian, as where he supplies articles at prime cost, his transaction is not illegal.[10] Nor is it illegal, if the goods are for the repair of the work-

[1] Turney's Case, 1 Bott, 333. [2] 4 & 5 Will. IV. c. 76, § 97.
[3] 55 Geo. III. c. 137, § 6; Henderson *v* Sherborne. 2 M. & W. 236.
[4] 4 & 5 Will. IV. c. 76, § 51. [5] 31 & 32 Vic. c. 122, § 44.
[6] 4 & 5 Will. IV. c. 76, § 77. [7] Pope *v* Backhouse, 8 Taunt. 239.
[8] West *v* Andrews, 5 B. & Ald. 328. [9] Davies *v* Harvey, L. R., 9 Q. B. 433. [10] Skinner *v* Buckee, 3 B. & C. 6.

house, for the statutes specify only goods supplied for the support of the poor as an establishment.[1]

Vestry clerk of parish.—As the earlier statutes provided no accommodation for holding a vestry, and it was usual to hold these in the church or vestry-room, which was generally inconvenient, and not seldom a scandal, it was at last allowed, in parishes having a population exceeding 2,000, that the vestry, with the consent of the Local Government Board, should procure a vestry-room, to be built or hired at the expense of the parish.[2] Another consequence was to authorise the vestry to appoint a vestry clerk to relieve the overseers. His duties thereupon required to be defined, and this the statute did. The duty of the vestry clerk is to do all the formal business relating to meetings of vestry, to prosecute ratepayers for arrears of rates, and to assist the overseers in making out their accounts, and to advise them in all the duties of their office. These duties are defined by statute, and are liable further to be qualified by the Local Government Board.[3] The appointment of a vestry clerk does not, however, exempt or discharge the overseers from the performance of any of their duties; it merely enables them, if they choose, to avail themselves of his assistance.[4]

Assistant Overseer.—A still further relief to overseers in their burdensome duties was the creation of a new paid officer in 1819 to help them. The inhabitants of any parish or township, in vestry assembled, might elect one or more persons to act as assistant overseers, prescribing their duties and fixing their salaries, to be paid out of the parish rates, taking security by bond for the faithful execution of this office. The appointment must be confirmed by two justices.[5] The object of appointing an assistant overseer is, that he should do the duties of an overseer, except so far as he is limited by the warrant of his appointment.[6]

Collector of poor rates.—There is still another paid officer, whom it has been found necessary to appoint for assisting the overseers. Not only may an assistant overseer be appointed in parishes above a certain population, but where guardians are elected in a parish or union, they may

[1] Barber *v* Waite, 1 A. & E. 514. [2] 13 & 14 Vic. c. 57. [3] Ibid. § 7. [4] Ibid. § 9. [5] 59 Geo. III. c. 12, § 7; 29 & 30 Vic. c. 113, § 18. [6] Baker *v* Locke, 18 C. B., N. S. 52.

also obtain the consent of the Local Government Board to the appointment by them of a collector of poor rates to be paid by salary.[1] The collector's duties, as well as his mode of appointment, are defined minutely by orders of the central board. He is required also to give security by bond, and before resignation he must give to the guardians one month's notice.

Paid officers appointed by guardians.—In unions of parishes having workhouses, a great variety of business arises out of the relief of the poor in those houses. Hence the guardians may, under directions of the Local Government Board, appoint paid officers to perform various duties, such as those of clerk to the guardians, treasurer, chaplain, medical officer, master, matron, schoolmaster, porter, nurse, relieving officer, and superintendent of out-door labour, besides other assistants. The central board has large superintending powers in all these matters, not only as to insisting on the appointment, but as to defining their duties and their salaries; and may even dismiss such officers. And this power exists, though the parishes are regulated by local acts.[2] And the same power extends to officers in houses hired for lodging the poor, not being workhouses.[3] But though the central board may require an appointment to take place, such appointment must be made in practice by and in the name of the guardians, who are the real managers of their district.[4] It is only when the guardians refuse within twenty-eight days to make the appointment, that the central board can do this part of their work for them.[5] And while the central board may remove an assistant overseer, or master of a workhouse, or other paid officer, any officer after being once removed, cannot hold such an office again without the consent of the board. Moreover, to guard against all suspicion of misconduct, any one who has been convicted of felony, fraud, or perjury is incapable of holding any parish office or of having the management of the poor in any way.[6] And this power of removal by the central board of a paid officer, with or without reason, is absolute, and cannot be inquired into by any court of law.[7]

[1] 7 & 8 Vic. c. 101, §§ 61, 62. [2] 4 & 5 Will. IV. c. 76, § 46. [3] 12 Vic. c. 13. [4] R. v Hunt, 12 A. & E. 130. [5] 31 & 32 Vic. c. 122, § 7. [6] 4 & 5 Will. IV. c. 76, § 48. [7] Re Teather, 19 L. J. M. C. 70.

Of these officers the treasurer, master, collector, relieving officer, and clerks are required to give security for the faithful performance of their duties.[1] And all the officers must perform their duties in person, except by special permission of the central board.[2] And those, who have the collection, receipt, or distribution of money, must account for their dealings before the auditor.[3] If the master or other officer of a workhouse wilfully disobeys the legal and reasonable orders of justices and guardians, he incurs a penalty of five pounds.[4] Such officers are also subject to a penalty for supplying for their own profit or on their own account goods used in relieving the poor.[5] And they are for like reasons forbidden under a penalty to receive directly or indirectly any gratuity, percentage, or allowance in respect of any contract for the supply of goods.[6] Any purloining or embezzlement by any paid officer is also punishable, as in the case of overseers.[7] And a summary remedy exists before justices as to paying over money due from them.[8] On the other hand, paid officers may have summary redress from justices for any assault committed on them, while in the due execution of their duty, as in the case of assaults on peace-officers.[9] And any expense incurred by such officers in restoring property of the parish may be reimbursed to them.[10]

Superannuation of poor law officers.—One advantage attaching to the paid officer of a union or parish, and cognate officers, whose whole time has been devoted to the service, is that of superannuation allowances, which the trustees or overseers may grant, with consent of the central board, when an officer is rendered incapable of service by age or permanent infirmity. Such allowance is not to exceed in any case two-thirds of the salary enjoyed at the date of retirement.[11]

Master of workhouse.—The duty of the master of the workhouse is to admit into the workhouse every person applying for admission, who may appear to him to require

[1] Gen. Order of 24 July, 1847, art. 184 ; 21 Jan. 1871. [2] Ibid. art. 198. [3] 4 & 5 Will. IV. c. 76, § 47. [4] Ibid. § 95. [5] Ibid. §§ 51, 77. [6] Gen. Order, 24 July, 1847, art. 218. [7] 4 & 5 Will. IV. c. 76, § 97 ; *ante*, p. 47. [8] 14 & 15 Vic. c. 105, § 9. [9] Ibid. § 18. [10] Ibid. § 5. [11] 27 & 28 Vic. c. 42 ; 29 & 30 Vic. c. 113, § 3 ; 30 & 31 Vic. c. 106, §§ 18, 19 ; 31 & 32 Vic. c. 122, § 15.

relief through any sudden or urgent necessity, and to cause every pauper upon admission to be examined by the medical officer.[1] He is also to provide for and enforce the employment of the able-bodied adult paupers during the hours of labour, to assist in training the youths in such employment as will best fit them for gaining their own living, to keep the partially disabled paupers occupied to the extent of their ability, and to allow none who are capable of employment to be idle at any time. The master is also to take care that no pauper at the approach of death shall be left unattended, either during the day or the night; to give immediate information of the death of any pauper to the nearest relations residing within a reasonable distance, and if the body be not removed within a reasonable time, to provide for the proper interment. And finally one most important duty is to bring before the visiting committee or the guardians any pauper inmate desirous of making a complaint or application to these authorities.

District workhouse schools.—The Local Government Board may combine unions and parishes into school districts for the management of infant paupers under the age of sixteen. It is necessary that these infants be chargeable to the union or parish, and be orphans or deserted by their parents, or whose parents or surviving parent or guardian consents to placing them in the school of the district.[2] The expenses of these schools are divided among the parishes, and the details of management are settled between the central board and the persons elected to form the district board.

District poor law auditors of accounts.—Much of the value of an organisation for expending the money of ratepayers in the relief of the poor depends on the strict adherence of the officers to their duties, and on the economy with which the money is applied to the various purposes. In order therefore to enforce more closely the regularity of accounts, the Local Government Board has power to combine unions and parishes in audit districts for the more

[1] Consol. Ord. 24 July, 1847, art. 208. [2] 7 & 8 Vic. c. 101, § 40; 11 & 12 Vic. c. 82; 30 & 31 Vic. c. 106, § 16; 31 & 32 Vic. c. 122, § 10.

convenient auditing of the accounts of the various officers employed.[1] And this salutary power has been held to extend over parishes and combinations managed under local statutes.[2] The auditor, in order to be free and independent of local influences, is appointed by the central board.[3] And still further to surround with checks all parochial extravagance, an important right is given to any ratepayer in the parish or union to be present at each audit, and to object in person to the accounts, and any part of them.[4] The auditor's duty is to consider all objections of others as well as his own, and to disallow in the accounts all that is illegal, or is the result of negligence or misconduct in the overseers or the officers concerned, and also to reduce exorbitant charges.[5] And to facilitate checks from ratepayers, the guardians of most unions must print and give at small cost to ratepayers certain parochial statements of account.[6] Among the charges allowed against a parish, nearly all of which are and must be authorised expressly by statute, it is lawful to include the expense of perambulating the parish once in every three years, and of repairing the boundary stones,[7] for this ceremony has a good effect in keeping alive in the minds of parishioners the true limits of their liability to rates.[8]

The auditor, it is true, may himself make mistakes. But if any person is aggrieved by the auditor disallowing his claim or surcharging him, his remedy is to remove the auditor's certificate by *certiorari*, and take the opinion of the Queen's Bench Division;[9] or apply to the Local Government Board for relief.[10] And the board is authorised, irrespective of strict law, to act on its own view of what is fair and equitable.[11] On the other hand, if there is no

[1] 7 & 8 Vic. c. 101, § 32. [2] 39 & 40 Vic. c. 61, § 32. [3] 7 & 8 Vic. c. 101, § 32; 31 & 32 Vic. c. 122, §§ 24, 25. [4] 7 & 8 Vic. c. 101, § 33. [5] Ibid. § 32; Gen. Order, 14 Jan. 1867. [6] Gen. Order 27 June, 1870. [7] 7 & 8 Vic. c. 101, § 60.

[8] In some rural parishes there still linger traces of imaginary claims to reimbursements by overseers for several obsolete practices, such as paying rewards for the heads of foxes. By 24 Henry VIII. c. 10, every parish was bound to keep a crow-net, and to pay rewards of twopence per dozen for crows brought dead or alive.—See also *ante*, p. vol. I., p. 484.

[9] 7 & 8 Vic. c. 101, § 35. [10] Ibid. § 36. [11] 11 & 12 Vic. c. 91, § 4; 29 & 30 Vic. c. 113, § 5; 39 & 40 Vic. c. 61, § 38.

appeal, then a summary mode of enforcing the auditor's certificate before justices is allowed.[1]

Compulsory relief of paupers by relatives.—Though the poor laws are designed mainly to save every human being from starvation, irrespective of all circumstances and conditions, yet a secondary resource in one or two cases is called in aid of this universal remedy. Mere relationship between parties considered by itself was not deemed by the common law a sufficient ground for one person, however destitute and helpless, enforcing a right against another to subsistence. In other words, any man or woman could neither be punished criminally nor civilly—could neither be imprisoned for not supplying nourishment, nor could his property be seized by the law and applied towards the maintenance of another, however nearly connected in blood or affinity, unless some contract to that effect had been entered into. It is true that if the pauper was an infant or lunatic, unable to take care of himself, and was under the immediate personal guardianship of another, then the law from the necessity of the case, and in protection of life, fixed a duty on such parent or guardian for the time being to supply food. But that duty again necessarily depended on this further qualification, namely, that such relative had the means to supply the wants of those dependent for the moment on his protection.[2]

This defect in the common law was taken notice of when the poor laws were first settled, and the defect to a small extent was supplied. The 43 Elizabeth, c. 2, § 6, enacted, that "the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame,

[1] 7 & 8 Vic. c. 101, § 32; 11 & 12 Vic. c. 91, § 9; R. *v* Finnis, 28 L. J., M. C. 201.

[2] This legal liability of a parent and child to supply food to each other when destitute, has varied in ancient and modern times. The ancient Egyptians did not compel sons to support their parents, but compelled daughters to do so.—*Herod.* b. 2. In China a son who wilfully refused to support a parent was punished with 100 blows of the bamboo.—*Staunton, Chin. Code,* 374. Solon also made it infamous not to support one's parents.—*Diog. Laert.* b. 1. But he exempted a child from such liability, if the father had not provided him with a trade, or if the child was a bastard.—*Plut. Solon.* It is said that by the laws of ancient Erin a parent when old could demand from his children a maintenance.—2 *O'Curry,* 79.

and impotent person, or other poor person not able to work, being of sufficient ability, shall at his own charges relieve and maintain every such poor person in that manner, and according to that rate as shall be assessed by the justices, upon pain, that every one of them shall forfeit twenty shillings for every month which they shall fail therein." And orders under this enactment may be made by justices of the peace having jurisdiction in the union or parish where the pauper is chargeable, and enforced in a summary way[1] at the instance of the guardians.[2] This enactment is not confined merely to children who have means to live upon. Moreover, nothing turns upon age, so that at whatever age pauperism overtakes one, the relatives mentioned are liable to contribute to this small extent. Moreover there is no order of priority in which the relatives mentioned are liable. The liability is such, that it is in the discretion of the justices to single out which of them, or which two or more of them, should be ordered to contribute, and the proportions of their respective contributions. But it is also to be noticed, that the pauper must go first to the parish before this resort can be made to the relatives; in other words, the liability of relatives is only subsidiary to that of the parish. These relatives are thus made liable to pay this contribution under a proceeding before justices, and if their goods are not sufficient to be distrained on, they are liable to imprisonment for a period proportioned to the sum unpaid, though such cases, where the relative is in poor circumstances, are not often pressed so closely.[3] But the process for enforcing payment of the sum ordered by justices is treated as criminal process.[4]

This enactment being viewed as imposing penalties on those, who were not liable at common law, is construed with strictness. It is only the blood relations, coming under the above degrees, who are liable. Thus one cannot be made to contribute to the support of a wife's mother;[5] or of a wife's child by a former husband, if above sixteen;[6]

[1] 59 Geo. III. c. 12, § 26; 31 & 32 Vic. c. 122, § 36. [2] 11 & 12 Vic. c. 110, § 8; 39 & 40 Vic. c. 61, § 25. [3] 31 & 32 Vic. c. 122, § 36. [4] Bancroft *v* Mitchell, L. R., 2 Q. B. 549. [5] R. *v* Munday, 1 Str. 190; 2 L. Raym. 1454. [6] Tubb *v* Harrison, 4 T. R. 118; 4 & 5 Will. IV. c. 76. § 57.

or of a son's wife or widow;[1] or of a brother or sister;[2] or of an illegitimate child, though in this last case another proceeding is often available.[3] And though a relative is bound under this statute to pay a sum assessed by the justices, yet the justices cannot order him to take the pauper to his own home and there support him.[4] But as a father and grandfather, mother and grandmother are mentioned without specifying any order of liability, it is held to be within the discretion of the justices to order either of these to pay, though the other may be equally or better able to do so.[5] And owing to the peculiar language of the statute, though a grandfather is bound to maintain a grandchild, the latter is not bound to maintain the grandfather, the word "child" being deemed not to include "grandchild" so as to imply this liability.[6] And not only must the pauper be correctly described in the justices' order to be a pauper, but it must be alleged in the same order, that the relative is of sufficient ability to contribute the sum ordered;[7] and it must state with certainty the sum that is ordered to be paid weekly "while the pauper or each of the paupers is not able to work," for to order a sum to be paid for a time certain will not meet the difficulty, seeing that it is always uncertain how long he may need the relief.[8] Such has been the stringent reading of this statute, probably founded on some singular notion, that the court should do its best to punish and discourage poverty, and put as many difficulties as possible in the way of enforcing help from prosperous relatives. An order of this kind made by justices must also show on the face of it, that it is in strict compliance with the statute. It must purport to adjudicate that the person, in whose favour it is made, is "poor, old, blind, lame, or not able to work," and it is not enough to say that he or she is in a poor, destitute condition, for that may well be, because the pauper will not work.[9] It has even been held that the order must state that the poor person is chargeable to the parish, though this seems a straining of the statute, which no court in

[1] R. v Kempson, 1 Bott, 373; 2 Str. 955. [2] R. v Smith, 2 Car. & P. 449. [3] Budworth v Dunphy, 1 Bott, 371. [4] R. v Jones, Fol. 53; 1 Bott, 364. [5] R. v Cornish, 2 B. & Ad. 498. [6] Maund v Mason, L. R., 9 Q. B. 254. [7] R. v Dunn, 1 Bott, 372. [8] Re Morten, 5 Q. B. 591. [9] R. v Gulley, Fol. 47.

modern times would have encouraged; for if the poor person is on the eve of becoming chargeable, the evil in view has already occurred.[1]

Parent wilfully neglecting to support children.—The poor law statutes did not, however, sufficiently meet all the difficulties, and later enactments have been required. It seems, that at one time parents refused to maintain their children, because the latter changed their faith. And hence popish parents, who declined to maintain children who had turned protestants, were declared by statute to be not discharged from liability.[2] And owing to a wealthy Jew once turning out of doors a daughter, who had become a convert to Christianity, it was deemed necessary to declare by express statute, that the obligation of Jewish parents was not got rid of in that way.[3] Not only is a parent bound to relieve and maintain his or her children as provided by the statute of Elizabeth, but if any person, being able to maintain him or herself, shall wilfully refuse or neglect to maintain his or her family, so that any of the family become chargeable to the parish, such person is liable to be imprisoned with hard labour for a month, as an idle and disorderly person.[4] This latter statute seems to have been intended to compel the parent to maintain the child before the parish had been called upon to do so; and in that respect it supplied an omission in the first statute, besides compelling a husband to maintain the wife also, as part of his family. The enactment also assumes that the person is able to maintain himself, and wilfully neglects to maintain his family. But the obligation of the husband is not absolute in all circumstances, for if a wife leaves her husband and commits adultery, he cannot be thus punished whether or not in other respects he has also committed adultery.[5] Again, if a wife has, by the misconduct of the husband, left him, and he offer to take her back and she refuse to return, if there is no reason to suppose that he will continue to illtreat her, he cannot in that case be convicted of wilfully neglecting to maintain her.[6]

A still more severe punishment awaits an absconding

[1] R. *v* Tripping, 1 Bott, 370. [2] 11 & 12 Will. III. c. 4. [3] L. Raym. 699; Com. J. 18 Feb., 12 Mar. 1701; 1 Anne, st. 1, c. 20. [4] 5 Geo. IV. c. 83, § 3. [5] R. *v* Flinton, 1 B. & Ad. 227. [6] Flanagan *v* Bishopwearmouth, 8 E. & B. 451.

parent. If a person run away and leave his wife, or his or her children chargeable to the parish, he will then be liable to three months' imprisonment, with hard labour as a rogue and vagabond.[1] And this punishment may be enforced within two years after the time when the family become chargeable.[2] In such cases, if the parent has left any goods and chattels, the overseers may obtain a warrant from justices of the peace to take and seize the goods, or draw the rents, and apply the proceeds towards reimbursing to the parish the charges for its bringing up or providing for the wife and children.[3] Nevertheless, under this enactment, sufficient property only can be seized for charges already incurred to the parish, and not for prospective charges.[4]

The husband may also be compelled to maintain the wife without the risk of being thus ignominiously dealt with as a rogue and vagabond. Wherever a wife is destitute and requires relief without her husband, and becomes chargeable, the guardians or overseers may obtain from justices of the peace an order commanding him to pay a weekly sum towards the cost of her relief to such person as the justices order. And on such application the justices may hear the wife's evidence on oath.[5] The wife, accordingly, may prove her marriage abroad or elsewhere by cohabitation, the evidence of marriage in such a proceeding being more akin to that which is required in civil actions of debt, than in suits for divorce or indictment for bigamy, in which last cases the marriage must be strictly proved.[6] And if the wife has left the husband for good cause, the justices may, nevertheless, inquire and adjudicate as to whether this is true.[7]

Liability of married women for husband and children.— While the liability for the maintenance of a wife and children is enforceable against the husband and father, there is, at last, also a corresponding liability imposed on the wife and mother, if she is possessed of separate property and the husband has none. This liability of the wife arises when the husband has become chargeable to

[1] 5 Geo. IV. c. 38, § 4. [2] Reeve *v* Yeate, 1 H. & C. 435; 39 & 40 Vic. c. 61, § 19. [3] 5 Geo. I. c. 1, §§ 1, 8. [4] Stable *v* Dixon, 6 East, 163. [5] 31 & 32 Vic. c. 122, § 33. [6] Deakin *v* Deakin, 33 J. P. 805. [7] Thomas *v* Alsop, L. R., 5 Q. B., 151.

the union or parish, in which case justices may, on the application of the guardians, make an order on her for his maintenance, as they can make an order on him for her maintenance.[1] And for a like reason justices may make an order on a mother having separate property to maintain her children, though her husband be alive, as if she were a widow; and yet the husband is not thereby discharged from his liability also to support them.[2]

Liability of man marrying woman having children.—Still another case may be supposed, namely, where at the time of marriage, the woman has children then living. In that event, the man, who shall marry a woman having children legitimate, or illegitimate, shall be liable to maintain these children as if they were his own, and shall be chargeable with all relief, or the cost price thereof, granted to such children, until they shall each attain the age of sixteen, or until the death of the mother, and such children shall be deemed part of his family.[3]

Starving of children.—The starving of children, though usually connected in some way with the poor laws, is not necessarily so, and the law on that subject is stated more appropriately under the head of "Variations caused by Age."[4]

Maintenance of bastard children.—The liability of the parents of bastard children, though also connected with the poor law, is liable to the same observation, and is treated in a later chapter of this work.[5]

Relief of paupers in workhouse.—The statute of Elizabeth in 1601 did not invent workhouses, though before another century elapsed the idea grew, that some institution of that kind was needed. About 1674, parish officers, in isolated places, were first authorised to erect and maintain workhouses; but it was not till 1723, half a century later, when they became general throughout the kingdom. By the year 1819, all parishes were authorised to build, or hire, or join in keeping such houses for the lodging and employment of the poor.[6] And since 1834, a parish, not then in possession of such house, was liable at the requirement of the central board to provide one, if the guardians

[1] 33 & 34 Vic. c. 93, § 13. [2] Ibid. § 14. [3] 4 & 5 Will. IV. c. 76, § 57. [4] See *post*, "Age," Chap. ix. [5] Ibid. [6] 14 Ch. II. c. 12; 9 Geo. I. c. 7; 59 Geo. III. c. 12.

required it.[1] It is, however, discretionary in such central board to enforce this power against the parish. To prevent any extravagance, a limit is put to the expenditure for enlarging or improving these workhouses, and such improvements or a temporary hiring of additional premises, may be enforced.[2] Not only is each union bound to provide a suitable workhouse for the ordinary poor, but wards for casual paupers must also now be maintained.[3] And when loans are necessary for these purposes, the repayment may be distributed over thirty years,[4] and the loan will be advanced by the government.[5] Though each parish or union must primarily look after itself, yet the guardians of one workhouse may contract with the guardians of another parish or union, to receive the paupers, or maintain the poor children of the latter, in cases of overcrowding, or epidemic, or insufficient accommodation, and subject to the consent of the central board.[6] Moreover, as a check upon the management of workhouses, any justice of the peace within whose district the house is situated, may at any time he pleases, enter and inspect it, so as to ascertain whether the byelaws and general orders applicable to them are obeyed.[7] The guardians are further bound by means of a visiting committee of their own, to carefully examine the workhouse once in every week at least, to inspect the reports of their officers, to examine the stores, and to receive and examine into any complaints of the inmates.[8] And once every quarter they must enter in a book their observations on the diet and treatment.[9] If the guardians neglect to appoint a visiting committee, or to visit the workhouse for three months, the central board may appoint a visitor at the expense of the common fund of the union to make such visitation.[10]

In the management of workhouses certain rules have been laid down by the central authority. When a pauper

[1] 4 & 5 Will. IV. c. 76, § 23; 12 & 13 Vic. c. 103, § 18. [2] 4 & 5 Will. IV. c. 76, § 25; 29 & 30 Vic. c. 113, § 8. [3] 34 & 35 Vic. c. 108, § 9. [4] 32 & 33 Vic. c. 45; 35 Vic. c. 2. [5] 4 & 5 Will. IV. c. 76, § 63. [6] 12 & 13 Vic. c. 103, § 14; 14 & 15 Vic. c. 105, § 6; 29 & 30 Vic. c. 113, § 16; 39 & 40 Vic. c. 61, § 22. [7] 4 & 5 Will. IV. c. 76, § 43; 12 & 13 Vic. c. 13, § 8. [8] Consol. Order, 24 July, 1847, art. 148. [9] 25 & 26 Vic. c. 111, § 37. [10] 10 & 11 Vic. c. 109, § 24.

is admitted, he is first examined by the medical officer, and if sick is sent to the sick ward; and if free from disease, he is placed in a certain part of the workhouse appropriated to his class. The clothes in which the pauper is received, as well as any property found on him and prohibited by statute or the rules, are taken from him, and put aside—to be restored, however, when he again leaves the workhouse; and while residing in the workhouse, he is clothed in a workhouse dress.[1] Again, if persons are admitted, who profess to be destitute wayfarers, they are searched, and if found in possession of money, the same is declared by statute to belong to the guardians, and is to be added to the common fund of the union, not by way of confiscation, but only to reimburse the outlay incurred. And if such persons have in possession or under immediate control, any money or other property of which they refuse to give any correct account, they are to be dealt with as rogues and vagabonds, and punished under the Vagrant Act.

Classification of paupers in workhouses.—One cardinal point of workhouse management is, that paupers are classified according to age and sex. Males are kept in a separate ward from females, children under the age of seven are separated from children above that age and under fifteen. The able-bodied men and women are separated from the infirm. Children under seven may be placed in the wards with female adults, and a pauper parent may be allowed to see a child each day in a suitable place. Owing to the hardship of separating married couples, it is enacted, that when husband and wife are inmates, and one is above the age of sixty, or is sick, infirm, or disabled by injury, they shall not be compelled to live separate and apart from each other in the workhouse, unless they are satisfied to do so.[3] If a pauper is of unsound mind and dangerous, or requiring restraint, he must, after fourteen days, be removed to a lunatic asylum.[4] But harmless lunatics or idiots may be detained or sent to an asylum.[5] The guardians may also contract for the maintenance of blind,

[1] Gen. Order, 24 July, 1847, arts. 95, 96. [2] 11 & 12 Vic. c. 110, § 10. [3] 10 & 11 Vic. c. 109, § 23; 39 & 40 Vic. c. 61, § 10. [4] 4 & 5 Will. IV. c. 76, § 45. [5] 30 & 31 Vic. c. 106, § 22; 31 & 32 Vic. c. 122, §§ 13, 43.

deaf and dumb adults in an hospital or institution not under their own immediate control.[1]

The discipline and food of paupers.—Minute regulations are laid down as to the time and place for the paupers taking their food. No pauper is to have or consume any liquor or food, other than what is prescribed. He is not to play at cards, or any game of chance, nor to smoke in any room of the workhouse. Any person may visit a pauper in the workhouse and hold an interview with him, but the presence of the master or an official is required, unless the pauper is sick.[2] A pauper, if free from disease, is entitled to quit the workhouse at any time on giving reasonable notice, which notice varies from one to three days, according to the length of his detention; but this notice may be dispensed with, according to circumstances.[3] If he is able-bodied and leaves the workhouse, having a family there, the family shall be sent with him, unless special reasons exist for the contrary.[4] They must all be kept employed according to their capacity and ability, and no pauper receives any compensation for his labour. And they cannot be employed at pounding, grinding, or otherwise breaking bones, or in preparing bone dust.[5] Though the guardians may prescribe a task of work to be done by a person relieved, yet such person cannot be detained for such work for more than four hours after breakfast on the morning following his admission. If any person refuse or neglect to do his task work, he may be convicted and punished under the Vagrant Act.[6] The task work for males consists in breaking stones or picking oakum, and for females in picking oakum, or scrubbing, or washing, or needlework. The creed of the paupers is to be registered, and any minister of a religious denomination, whose church or chapel is nearest to the workhouse, or any ratepayer in the union, may inspect such register. Such minister may visit and instruct those of his religious creed; and any inmate may be allowed to attend a place of worship of his own creed, if not otherwise provided; and children are also instructed in the creed of the parents as nearly as possible.[7]

[1] 30 & 31 Vic. c. 106, § 21. [2] Gen. Order, 1847, art. 118.
[3] 34 & 35 Vic. c. 108, § 4. [4] Gen. Order, 24 July, 1847, art. 115.
[5] Cons. Order, 24 July, 1847, arts. 112, 113. [6] 5 & 6 Vic. c. 57, § 5.
[7] 31 & 32 Vic. c. 122, §§ 19-22.

Every workhouse is provided with a casual ward,[1] and though a casual pauper is not usually admitted except by a written order signed by a relieving officer, or in case of urgent necessity by an overseer, yet the master of the workhouse or his representative may also of his own authority in an urgent case admit such pauper, and a record of any refusal of admission is always kept.[2]

Any person carrying into a workhouse, or attempting to carry in, any spirituous or fermented liquor, without the written order of the master, incurs a penalty of ten pounds,[3] and the master himself, for a like offence, is fined double that sum.[4] The paupers are punishable by commitment to gaol for drunkenness, or misbehaviour, profane language, playing at cards, and other offences.[5] A refractory pauper, that is, one who within a week repeats a previous disorderly offence, cannot be punished by the master or guardians with confinement for more than twenty-four hours.[6] No corporal punishment can be inflicted on any female child; nor on any male child above fourteen, nor under that age, except with a rod, and in presence of the master and schoolmaster; and a record is to be kept of all punishments.[7] It is also an offence, punished by imprisonment, for a person to obtain relief by false statements, or to leave the workhouse before he is entitled to do so by the regulations, and part of such regulations is, that he shall first perform a task of work.[8] And such paupers offending may be punished under the Vagrant Act as idle and disorderly.[9]

No corporal punishment is allowed to be inflicted in a workhouse on any adult paupers; nor can they be detained for any offence whatsoever for more than twenty-four hours, except where such time is occupied in taking them before a justice of the peace.[10] Nor is it lawful to put a pauper of sane mind in manacles or chains.[11]

Relief of paupers out of workhouse.—Some circumstances attending outdoor relief require also notice. The board

[1] 34 & 35 Vic. c. 108, § 9. [2] Gen. Order, 22 Nov. 1871. [3] 4 & 5 Will. IV. c. 76, § 92. [4] Ibid. § 93. [5] 55 Geo. III. c. 137; 7 & 8 Vic. 101, § 57; 34 & 35 Vic. c. 108; Consol. Order, 24 July, 1847, § 127. [6] 54 Geo. IV. c. 170, § 7. [7] Gen. Order, 1847, §§ 138-145. [8] Gen. Order, 22 Nov. 1871; 34 & 35 Vic. c. 108. [9] 39 & 40 Vic. c. 61, § 44. [10] 54 Geo. IV. c. 170, § 7. [11] 56 Geo. III. c. 129, § 2.

of guardians of a union or parish are the statutory governors of the workhouse, but are always subject to the regulations of the central board,[1] the overseers having no longer any concern in such matters, except to direct relief in sudden and urgent necessity. And in parishes regulated by local acts, the relief is administered as in unions by the authority described in such acts.[2] In administering relief, it must be recollected, that the guardians always have a discretion as to whether they will insist on the pauper residing in the workhouse as a condition of receiving any relief at all. But when they resolve to give outdoor relief, their powers are confined by rules of the central board within the following limits. One half, at least, of such relief to able bodied males, is to be given in the form of articles of food or fuel, or of absolute necessity, and it is to be given weekly. Moreover, the guardians are not on any account to expend money in purchasing, or redeeming from pledge, tools or implements of trade, though they may redeem articles of clothing or bedding. Nor are they to pay for the conveyance of paupers, except in a few cases, nor to pay in any case for the rent or lodgings of the pauper.[3] It is in cases of sickness, accident, and infirmity, that outdoor relief is usually given; and to keep alive the principle, that such relief is not to be encouraged, and requires justification where the pauper is an able bodied male, the guardians are required to record in their minutes the fact and the specific cause of such relief.[4]

Able-bodied paupers how treated.—The able-bodied paupers are treated with considerable strictness. And none such, whether male or female, are relieved out of the workhouse except under very special circumstances. These are, where some sudden and urgent necessity, sickness, or accident exists; where part of the family is afflicted with mental or bodily infirmity, or requires burial; or

[1] 4 & 5 Will. IV. c. 76, §§ 38, 39, 54; 11 & 12 Vic. c. 91, § 12.

[2] Lord Althorp said, in 1834, that the introduction of out-door relief had led from bad to worse.—22 *Parl. Deb.* (3rd.) 874. Most of the ever-recurring defects in the poor law are connected with this part of the system.

[3] 4 & 5 Will. IV. c. 76, § 52; Gen. Order, 14 Dec. 1852. [4] Gen. Order, 21 Dec. 1844.

when it is a widow, whose husband has recently died, or has left children destitute.[1] But as a general rule no relief is given, when the person is receiving wages or hire, unless he be set to work by the guardians. This rule is, however, not insisted on, if there is urgent necessity, or sickness, or accident.[2] And the relief must, as already stated, be given weekly. And in general, though a power is given to the guardians to make exceptions to the rules and orders, a report of the circumstances must be sent to the central board, and confirmation obtained.[3] And where the guardians require a task of work to be done by paupers, this is enforced, on the one hand, by imprisonment;[4] while on the other hand the kind of work requires to be approved by the central board.[5]

Pauper children and their schools.—As paupers are of all ages, it is necessary that those who are of tender years should have their education attended to, in order that when sufficiently advanced they may have an opportunity of emancipating themselves from the demoralising associations of pauperism. Formerly the pauper children were taught exclusively in the workhouse or workhouse schools; but since the Education Acts some slight advantage has been taken of the elementary schools. And the circumstances under which poor persons who are or are not paupers may be assisted by the guardians with means of payment of school fees without coming within the category of paupers are stated in another chapter.[6] The guardians may give or advance money to pay for the education of the pauper's children between four and sixteen in a school approved by the guardians;[7] and the same for children deserted by parents, or whose parents are dead.[8] They may also make a contract to send their pauper children to voluntary schools certified by the central board.[9] But if the child has parents, their consent is required, and if the child is above fourteen, then the child's consent also is required. And the religious education given at such school must agree with that of the parents or next of kin of the child.[10] And in the case of

[1] Gen. Order, 21 Dec. 1844. [2] Ibid. 14 Dec. 1852. [3] Ibid. [4] 29 & 30 Vic. c. 113, § 15. [5] Gen. Order, 21 Dec. 1844. [6] See *post.* Chap. ix. [7] 18 & 19 Vic. c. 34, §§ 1, 4. [8] Ibid. § 5. [9] 25 & 26 Vic c. 43, § 1. [10] Ibid.; 29 & 30 Vic. c. 113, § 14.

an illegitimate child, the school of the mother's religious denomination is preferred.[1] The guardians may also contract for the education of deaf and dumb and blind children in special institutions.[2] Though they always have a schoolmaster for the education of the children, they may in their discretion board out some of their pauper children between the ages of two and twelve years. Such children, however, must be orphans or deserted or otherwise uncared for by parents. Not more than four children are allowed to be boarded in one house at one time, and the arrangements are managed by a boarding out committee, consisting of persons acting gratuitously under the rules and regulations of the Local Government Board, as to supervision over the children's health, food, and education. The weekly payment for each child allowed to the foster parent is not to exceed four shillings.[3] And if a child under the age of fourteen in a workhouse is refractory, the guardians may apply to two justices of the peace to send such child to a certified industrial school.[4]

Guardians apprenticing pauper children.—Separate rules so far back as the time of Queen Anne were made for parish apprentices, and these were often sent to the sea service. The statute of Anne authorised the overseers, with consent of two justices, to bind as apprentice to the sea service, giving to each proper clothes for the purpose, any boy of the age of ten, who should be begging for alms, or be chargeable to the parish, or be the child of parents who were chargeable; and the indenture was to be sent to the collector of customs at the port to which the master belonged, and to be registered. The rules for binding pauper boys to the sea service are now contained in the Merchant Shipping Act.[5] And the boys may now also be sent to the naval service.[6]

There were also from the time of Elizabeth statutes giving power to overseers to bind their pauper children as apprentices till the age of twenty-one, provided the master resided within a distance of forty miles.[7] And in 1697, it was made compulsory on masters when selected to receive

[1] 31 & 32 Vic. c. 122, § 23. [2] Ibid. § 42. [3] Gen. Order, 25 Nov. 1870. [4] 29 & 30 Vic. c. 118, § 17. [5] 17 & 18 Vic. c. 104, §§ 141–5. [6] 39 & 40 Vic. c. 61, § 28. [7] 43 Eliz. c. 2; 18 Geo. III. c. 47; 56 Geo. III. c. 139, § 7.

these boys, though this compulsory enactment was repealed in 1844.[1] When the child was sent to a different county, two justices of that county required, after due examination, to allow or certify their concurrence in the binding or its assignment.[2] But when unions were formed, the powers of overseers to bind parish apprentices were transferred to the guardians, and instead of justices allowing the contract, the orders of the central board were thenceforth to regulate the whole business.[3]

There are also rules laid down for the guidance of guardians in apprenticing pauper children to trades at home. These rules provide, that no child shall be apprenticed under nine years, nor for more than eight years; that the premium shall consist of clothes and money, but only of clothes when the child is above sixteen years; and that no child above fourteen shall be bound without his consent, nor above sixteen without the consent also of the father, unless the latter is in prison or abroad. The master is on his part to send the child to a place of worship once at least every Sunday, with a power to the parent or to the child, if above sixteen, of selecting such place of worship; and if the parents desire, the master is to allow the child also to attend a Sunday school, and when the apprentice is above the age of seventeen, he is to receive some wages from the master every week.[4]

Though in strictness when youthful paupers go out into the world as apprentices or servants, the surveillance of guardians over them ceases, yet these have the duty of looking after them to some extent in the new situation or employment. Where any young person under the age of sixteen has been hired from a workhouse, the officials are to keep a register of the place of employment, and cause their officer, or the officer of another union, to visit such young person twice every year, in order to ascertain whether each has proper food and treatment.[5] And in case of ill treatment of these friendless young people, the guardians may prosecute the offender.[6] They may also pay

[1] 7 & 8 Vic. c. 101, § 13. [2] 56 Geo. III. c. 139; 3 & 4 Will. IV. c. 63. [3] 7 & 8 Vic. c. 101, § 12. [4] Gen. Order, 24 July, 1847. [5] 14 Vic. c. 11. [6] 24 & 25 Vic. c. 100, § 73.

a competent person to visit and report as to the condition of any such child under sixteen who is in service.[1]

Guardians and overseers assisting emigration.—Though the guardians of a union, or parish, or the overseers are not allowed to raise and apply poor rates for any purpose but that of maintaining the paupers within their own area, yet there is a limited power given to assist paupers to emigrate at the expense of the poor rate. To enable this to be done the ratepayers and owners of a parish must meet in vestry, and resolve that this is an expedient thing to do. The limit of money to be borrowed is not to exceed half the yearly poor rate, and to be repaid within five years out of the rates. But this mode of applying the funds must be sanctioned by the central board.[2] And the guardians of a union may in like manner apply part of their funds for the purpose of assisting the irremovable poor to emigrate; and no vestry meeting is required where the authorities of a union or parish obtain the consent of the central board.[3] The same power is also given to assist in the emigration of orphan and deserted children, if these give their consent in presence of two justices.[4]

Finding work for paupers.—Though the idea prevailed for more than a century, that it might be practicable to find work for paupers, so as to make the workhouse to a certain extent self-supporting, this has been found in practice a delusive notion. The stimulus of self-help is altogether gone in most cases, when paupers enter a workhouse. The ambition to support themselves rapidly dies away under the paralysing associations surrounding them. The power of guardians, therefore, to speculate in any kind of manufacture with the ratepayers' money is carefully checked.

The employment of paupers otherwise than within the workhouse is confined within narrow limits. The overseers, with the consent of the inhabitants, may take into their own hands or hire fifty acres of land, and employ paupers at work on such lands, and pay them reasonable wages.[5] Or they may inclose the same extent of waste land or forest land with the consent of the owners of such

[1] 39 & 40 Vic. c. 61, § 33. [2] 4 & 5 Will. IV. c. 76, §§ 62, 63; 7 & 8 Vic. c. 101, § 29. [3] 11 & 12 Vic. c. 110, § 5; 12 & 13 Vic. c. 103, § 20. [4] 13 & 14 Vic. c. 101, § 4. [5] 59 Geo. III. c. 12, § 12; 1 & 2 Will. IV. c. 42, §§ 1, 3.

waste.[1] And guardians of unions and parishes have also like powers.[2] The Inclosure Acts moreover allow small field gardens to be hired by poor inhabitants; but this is not strictly a part of the poor law administration, and belongs rather to another head of the law.[3]

How far relief to paupers treated as a loan.—As destitution of that kind which brings an applicant to the workhouse implies a negation of all property, it seems at first sight a contradiction in terms to assume that the pauper can take up the position of a borrower. For the moment he is utterly bereft of resources. As, however, it may be supposed that the time may come when he can repay whatever may be advanced to him, there arises in that view at first sight specious ground for making it a general rule, that whatever may be advanced to him in the hour of need, either for subsistence or clothing, must count as a debt, and therefore a burden binding upon him, should fortune again place him above want. But this view is so unlikely ever to be realised, that to impose such a condition would only be harassing the needy and making their fate still more miserable and hopeless. All relief therefore is treated as a gift, and not as a loan. And indeed it would lead to speculation and improvidence, if guardians had the power of advancing money in this way, with or without security. Nevertheless, to meet a few very exceptional cases, a power is given to guardians and overseers to treat as a loan the relief given to adult paupers, and to recover the cost price in a summary way or in the county court.[4] But it requires a special authority of the central board to justify this arrangement, and notice to the pauper relieved must also be given.[5] When relief has been lawfully given as a loan, the justices may compel the pauper's master, if any, to pay part of the pauper's wages direct to the guardians.[6] Moreover, irrespective of any specific authority or agreement to treat the relief as a loan, whenever it appears that a pauper has money or valuable securities for money in his possession, the

[1] 1 & 2 Will. IV. c. 42, § 11. [2] 5 & 6 Will. IV. c. 69, § 4. [3] 59 Geo. III. c. 12; 1 & 2 Will. IV. c. 42; 5 & 6 Will. IV.; 39 & 40 Vic. c. 56, § 26. [4] 59 Geo. III. c. 12, § 29; 4 & 5 Will. IV. c. 76, § 58; Gen. Order, 21 Dec. 1844, § 7; 11 & 12 Vic. 110, § 8; 39 & 40 Vic. c. 61, § 23. [5] Gen. Order, 14 Dec. 1852. [6] 4 & 5 Will. IV. c. 76, § 59; 39 & 40 Vic. c. 61, § 42.

guardians may enforce a claim to reimbursement out of such money to the extent of the value of the preceding twelve months' relief afforded to him; and in the event of the pauper's death, they may recover in like manner the expenses of his burial, as well as of his maintenance for the twelve months preceding his death.[1] And a "valuable security" in this enactment has been interpreted liberally, so as to include a sum recovered by the pauper in an action.[2] And in like manner when a lunatic or idiot, whether chargeable to the parish or not, has estate real or personal, two justices may authorise the parish representatives to seize and apply such property to reimburse and pay the expense incurred in his maintenance and care.[3] And if the families of seamen are relieved in their absence, a reimbursement out of the allotment notes may be obtained by the guardians from the owner of the ship in respect of such relief to a limited extent.[4]

Casual poor and their relief.—"Casual poor" is a name given to those persons not being in the parish of their own usual residence, when they are overtaken by sudden necessity, accident, or illness. In such cases the parish in which they fall into want is bound to relieve them at its own expense, until the exigency is past; first, because all persons in want are *primâ facie* entitled to relief where they are found; and secondly, because no enactment enables the relieving parish to recover the expense from any other parish. The relieving parish or union must therefore maintain the pauper until he is sufficiently cured or recovered; after which he may be removed in the usual way.[5]

The guardians of every union or parish (though at first only those in the metropolis were mentioned) are bound to provide sufficient casual wards for the reception of destitute wayfarers, wanderers, or foundlings.[6] In the metropolis all the casual wards are deemed to be in the same union.[7] These wards must be inspected by the central board officers once every four months.[8] They

[1] 12 & 13 Vic. c. 103, §§ 16, 17. [2] West Ham *v* Ovens, 36 J. P. 776. [3] 16 & 17 Vic. c. 97, §§ 94, 104. [4] 17 & 18 Vic. c. 104. §§ 192, 193. [5] 24 & 25 Vic. c. 55. §§ 4, 5; 28 & 29 Vic. c. 79, [6] 27 & 28 Vic. c. 116, §§ 4, 5; 34 & 35 Vic. c. 108, § 9. [7] Ibid. § 5. [8] 28 Vic. c. 31, § 2.

must be open in the metropolis during the whole night for the reception of casual paupers.[1] And any constable in the metropolis may take a destitute person to any of these wards, and if there is accommodation, admission must be given to such person.[2] A casual pauper, after being housed for the night, is not entitled to be discharged till eleven o'clock on the following morning after his admission, nor before he has performed a certain amount of work prescribed to him; and if the pauper has been more than twice in the same month admitted into the same or any other metropolitan casual ward, the period of this detention increases.[3] And to abscond or refuse without cause (such for example as bodily weakness) to do the work assigned, is punishable with imprisonment.[4]

Relief of metropolitan poor.—And some particulars relating to the metropolitan poor require notice. The metropolitan poor are managed somewhat differently from the poor in other places, owing to the intimate connection that exists between the various parts of the metropolitan area, or the area composed of the parishes included under the Metropolis Management Act, 1855.[5] For most purposes these unions and parishes are dealt with very much as if they formed one metropolitan union. Though guardians are elected for metropolitan parishes and unions, the central board has power to nominate such other persons as it thinks fit out of justices of the peace, or ratepayers, though not resident, so that those nominated and the *ex officio* guardians together shall not exceed one third of the whole body.[6] Asylums are provided by groups of metropolitan parishes for the common purpose of maintaining their sick, insane, or infirm paupers, or any other class of poor, and thus a better classification is effected.[7] And managers, partly elected by such parishes, and partly by the Local Government Board, have the control and management of such asylums, having moreover the powers of guardians over the inmates.[8] They may borrow money

[1] 28 Vic. c. 34, § 5; 34 & 35 Vic. c. 108, § 3. [2] 28 Vic. c. 34, § 4. [3] 34 & 35 Vic. c. 108, § 3; Gen. Order, 22 Nov. 1871. [4] 34 & 35 Vic. c. 108, § 7. [5] 30 Vic. c. 6. [6] 30 Vic. c. 6, § 79; 31 & 32 Vic. c. 122, § 9. [7] 30 Vic. c. 6, §§ 5, 6; 39 & 40 Vic. c. 61, § 40. [8] Ibid.; 32 & 33 Vic. c. 63, § 6; 31 & 32 Vic. c. 122, § 9.

to provide such asylums, subject to conditions as to the amount and the time of repayment,[1] and may acquire lands under compulsory powers.[2] The metropolitan guardians and managers of asylums may also provide ships for training some of their pauper boys for the sea service.[3] The expenses of an asylum are made up by contributions from the parishes for which it is used, as in cases of ordinary unions of parishes.[4] And the central board prescribes what class of paupers shall be sent to each of the asylums respectively.[5]

In the metropolitan district, each parish or union is required to provide a dispensary for medical outdoor relief;[6] and this dispensary is usually managed by a dispensary committee appointed by the guardians.[7] The central board may also require the guardians of one metropolitan parish or union to receive into their workhouse certain classes of paupers from other parishes on terms of mutual accommodation.[8] And the unions and parishes in the metropolitan district also differ from others in this, that they have a common poor fund, to which they contribute according to the respective annual ratable value of each union or parish, and the amount is settled by the central board.[9] Out of this common fund are paid the expenses of their lunatic paupers, fever and small-pox patients, medical relief, salaries of school and asylum officers, and medical dispensers, fees for registration of births and deaths, vaccination expenses, maintenance of pauper school children and of casual paupers.[10] And last, but not least, to these has been added the maintenance of all the indoor poor.[11]

These important modifications of the general law, which governs the rest o England, bind together the parishes in the metropolitan area, and give a unity of interest and community of management which are elsewhere unattainable. The centralising power is greater, but the motives of self-interest, which serve to engage the peculiar attention

[1] 30 Vic. c. 6; 31 & 32 Vic. c. 122, § 35; 32 & 33 Vic. c. 63; 34 Vic. c. 11. [2] 30 Vic. c. 6, § 53. [3] 32 & 33 Vic. c. 63, § 11; 34 Vic. c. 15, § 1. [4] 30 Vic. c. 6, § 32. [5] Gen. Orders, 6 Oct. 1870; 23 Dec. 1870. [6] 30 Vic. c. 6, § 38; 32 & 33 Vic. c, 63, § 12. [7] 30 Vic. c. 6, § 40. [8] Ibid. § 50. [9] Ibid. § 62. [10] Ibid. §§ 69, 70; 32 & 33 Vic. c. 63, § 15. [11] 33 & 34 Vic. c. 18, § 1.

of each parish and union, in the pursuit of economy, are not lost sight of.

Early ideas of settlement and removal.—Though the fundamental idea of a poor law is, that no one shall be allowed to starve, in whatever part of the country he is found, yet inasmuch as each parish, or latterly each union, has to provide the funds for relieving all who are found destitute within its own area, and thus the fewer paupers that require to be relieved, the lighter is the burden on the local inhabitants, there is a seeming conflict between these two objects. To give effect to the first would be to welcome all comers; to give effect to the second would be to drive away as many of them as possible into some other area or district. If all the paupers of the country happened to flock to some favourite spot and live and starve there, their aggregate claims to a maintenance might swallow up much of the property of their more prosperous neighbours, many of whom however are little better off than themselves, while those who lived in the parishes from which these intruders came would to the corresponding extent escape the burden of their relief. Hence a real injustice early attracted attention. The problem was how to check the paupers from overrunning one spot, or how to equalise the burden more uniformly. Some check was required, and the first crude idea was, that all who were born in a parish ought to look to that parish only for relief, and the rest should be sent away. But this again checked the free interchange of labour and the natural right of every man to go anywhere and everywhere in order to better himself. Soon a few tests besides birth were invented, such as living a certain time as a servant, or apprentice, or renting a tenement, or paying taxes; and these characteristics of a settled life were deemed equivalent to paying one's way. Such conditions were viewed as reasons for allowing poor people to remain where they were, even though they had not been born there; and if such conditions were absent, then it was held, that the pauper must be sent away to some other parish on which he had a better claim. It was thus that the first notions of settlement and removal obtained ground; but in working them out, a want of consideration and reflection for the state of the destitute as well as the self-supporting poor was apparent, and intelligent observers have remarked

that the paupers under the early poor law were only slaves and villeins of a kind slightly different from what they had been some century or two before.

All that was wanted in order to do justice was to find out one or two rough tests, whereby to distinguish mere accidental wayfarers and stragglers from those who may be said in some sense to "belong to a parish." And one might have thought a short residence, coupled with the fact of paying one's way during that residence, was all the discriminating test that was needed. But unfortunately the legislature selected several kinds of tests, which were exceedingly intricate, vague, and rambling; and the courts interpreting in favour of parishes the words of the statute liberally, insisted on a literal fulfilment of the conditions. It is easy after all our subsequent experience to comprehend how indeterminate, frivolous, and usually irrelevant were those tests. The result was, that owing to the vague and yet intricate language of the settlement statutes and the rigid interpretation put on them by the courts, a vast loss of money and time and talent occurred. All the learning of acute minds brought to bear on such minute particulars may be said to have clothed the walls of libraries with precedents on precedents, but little real advancement has been made. Except a few useful decisions on the law of evidence and on landlord and tenant, scarcely one valuable idea will soon be saved out of the wreck of two centuries of poor law litigation. The record of the Settlement Acts and the decisions upon them is an apt illustration of means singularly ill adapted to promote the only purpose that ought to be kept in view.

Different kinds of settlement.—All the kinds of settlement that have prevailed may be reduced to the following heads. 1. By three years' residence. 2. By hiring and service; 3, by apprenticeship; 4, by estate; 5, by renting a tenement; 6, by paying taxes; 7, by serving a parochial office; 8, by parentage; 9, by marriage; 10, by birth. Each of these heads requires only a slight notice; for one or two of them have been abolished for many years, and all are reduced to comparative insignificance by the latest development of the law in 1876, which declares the last three years' residence to be now the primary settlement.

Settlement by three years' residence.—Of all the grounds

of settlement which are now about to be mentioned, that which is entitled to the first place is the latest in point of creation, being no older than 1876, viz., where the pauper has resided for three years in a parish in such circumstances as would make him under another series of statutes what is called an irremovable person.[1] And this settlement is to continue till he acquire a settlement by a like residence in some other parish, so that this settlement will override and extinguish all other settlements in a short space of time. The great defect of this new ground of settlement is that it has been nearly two centuries too late in coming into force, for if adopted at first it would have saved enormous litigation and expense to ratepayers, as well as vexation, uncertainty, and cruelty to paupers. Nor was it by any means a new idea, for in the early statutes before Elizabeth, which dealt with sturdy beggars and vagabonds, it was usually commanded that these persons should be whipped back to the parishes where they were born, or where they had last lived for three years. And a statute of Henry VIII. mentions this three years' period as if it were one which had always occurred as a very fair test of the locality to which a person may be said to "belong," so far as it can be predicated that any person "belongs" to anywhere. What is wanted in all such cases is a fair test that can be easily and inexpensively discovered and applied; and yet this idea unfortunately seems never to have occurred to our earlier legislators. The legislators and legal reformers, however, of the last eighty years had again and again suggested this period of three years' residence as the best and most easily proved settlement, instead of the fanciful, artificial, and often purposeless criteria involved in nearly all the other settlements which had been in vogue from the time of Charles II. In order, however, to explain the ingredients of this three years' residence or irremovability it will conduce to greater clearness to refer to that portion of this chapter, where an explanation is given as to how that which is called the status of irremovability is acquired, for nearly the same circumstances which now make a pauper irremovable after one year's residence confer upon him a settlement after three years residence.[2]

[1] 39 & 40 Vic. 61, § 34. [2] See *post*, p. 89.

Settlement by hiring and service.—The settlement by hiring, and a service under such hiring, which once occupied a conspicuous place in the law, was wholly abolished in 1834 for most purposes, and the state of the law before that date can scarcely now ever come in question, and therefore it deserves only a short notice. The settlement by hiring was created and defined by the statutes 3 William and Mary, c. 11, § 7, and 8 & 9 William III. c. 30, § 4, the words being that "if any unmarried person not having a child or children shall be lawfully hired into any parish or town for one year, and shall continue and abide in the same service during the space of one whole year, such service should be adjudged and deemed a good settlement therein." In construing and applying this definition a great variety of decisions had been come to according as new circumstances occurred during nearly a century and a half. All the servants and apprentices in England were more or less touched by this chapter of the law. In course of clearing up the meaning, the courts determined that a hiring differed from an imperfect apprenticeship;[1] that if the hiring was under a deed defective for a stamp, it would not count; that an indefinite hiring generally meant a hiring for a year;[2] that an imported slave did not fulfil the description of a hired servant;[3] that living with relatives under no particular terms of friendship or charity did not amount to a hiring; that hiring by the week or month, or by the job, however long continued, would not do;[4] that if even one holiday was stipulated for during the year, or if the work was limited to certain hours in the day, it would not count as hiring for a year;[5] that if the service did not include the odd day in leap year, then it was not service for a year:[6] that if there were two separate hirings, which in the aggregate exceeded a year, but one day only occurred between them, this was no hiring for a year.

The residence required of a servant hired for a year in order to satisfy this statute 3 William and Mary, c. 11, § 7, was deemed sufficient if it had continued for forty days. The origin of this rule arose out of the construction

[1] R. v Tipton, 9 B. & C. 888. [2] R. v Stockbridge, Burr. S. C. 759. [3] Cald. 516. [4] R. v Warminster, 6 B. & C. 77. [5] R v Trekingham, 7 A. & E. 866. [6] R. v Roxby, 10 B. & C. 51.

of the statute of Charles II., and is scarcely now worth explaining at greater length. The forty days' residence of a servant hired for a year was necessary to complete the settlement, and that was all that was required.[1] But then another formidable difficulty grew up, namely, when a servant slept in one parish and worked all the day in another parish, which of the two tests of residence was to be accepted? The courts decided in favour of the sleeping test.[2] An impressive judgment to this effect was given in 1718. The house of the master lay as to two thirds of it in the parish of Graveney, and one third of it in the parish of Feversham. The master hired a maid servant, and she lodged in that part of the house that was in Feversham, while the master himself lodged in that part of it which was in Graveney, and she did all her housework in Graveney. The court held that "the maid's settlement was in Feversham, in the parish where she lay;" and it is added "both parties acquiesced under that opinion."[3] In another case, where a mail driver divided the night between places in two parishes, taking four hours' sleep in one and two or three hours' sleep in another, the court held the latter was his chief place of rest, and he got his settlement there, for it was the finish of his rest.[4] Coke indeed had observed "if a man have a house within two leets, he shall be taken to be conversant where his bed is," and the only reason given was "for in that part of the house he is most conversant, and here conversant shall be taken for most conversant."[5] Again where the servant slept in different parishes during the year's hiring, then the last parish in which he or she had slept for forty days during the hiring was taken to be the test of the settlement.

Settlement by apprenticeship and service.—Another ground of settlement was by reason of apprenticeship. A settle-

[1] Sess. C. 337; 1 Barn. 436. [2] Fort. 221; 2 Bott, 276; 1 Str. 528; 2 Str. 794. [3] Foley, 198; Fort. 221. [4] R. *v* Middenhall, 3 B. & Ald. 374.

[5] 2 Inst. 122. There is a tradition in the profession that the case once arose, where the head of the servant's bed was in one parish and the foot of it in another parish, and the question was, in which parish she had obtained a settlement. Owing, however, to some oversight on the part of the reporters, the decision of the court seems not to have been recorded.

ment might be acquired in a parish ever since 1691 by reason of apprenticeship; thus "if any person shall be bound an apprentice by indenture, and inhabit any town or parish, such binding and inhabitation shall be adjudged a good settlement."[1] Simple as these words appeared, litigants called for a vast number of decisions of the courts in order to establish and make them more clear. In order to gain the settlement by apprenticeship, the apprentice must not only be bound, but must serve for forty days at least under the hiring in some parish or place maintaining its own poor, as set forth in the statute of 14 Charles II. c. 12, § 1.[2] The service need not be continuous.[3] And as between two or more parishes, where an inchoate residence existed, that in which the apprentice slept the last night of the forty days with his master's sanction was deemed the place of settlement.[4]

Settlement of paupers by reason of ownership of estate.—The statute of Charles II. authorised all poor persons coming to settle in a house of less value than ten pounds to be removed in forty days to the place where they last lived forty days. Hence it followed by implication, that as an owner of his own house did not fulfil that description, he could not be removed, and if he lived forty days on his own estate he impliedly had a settlement there. But here also difficulties occurred. The courts, after many decisions, settled the rule, that the kind of estate giving this qualification must be an estate in possession, though acquired through a wife. But mere ownership without forty days' residence would not suffice. Yet these forty days need not be consecutive. In 1834 a statutory change was made, whereby the owner lost his settlement by estate, if he ceased to live in the parish or within ten miles.[5] In 1722 a statute had also said, that this settlement could not be acquired by purchase of an estate, unless the consideration amounted to thirty pounds *bonâ fide* paid, and unless the purchaser continued to inhabit the parish.[6] All these particulars caused much litigation, but the results are now no longer worthy of notice.

Settlement by renting a tenement.—The statute of 14

[1] 3 W. & M. c. 11, § 7. [2] Clerkenwell *v* Bridewell, 1 L. Raym. 549. [3] R. *v* Aldstone, 3 B. & Ad. 207. [4] Barton *v* Hulme, 3 B. & S. 662. [5] 4 & 5 Will. IV. c. 76, § 68. [6] 9 Geo. I. c. 7, § 5.

Charles II. was obscure as to how far the mere renting of a tenement, or part of one, by itself, and how long occupied, amounted to a settlement, and the inquiry how that matter stood then and before is now almost frivolous. In 1819 a statute passed, which recited the many disputes and controversies on that point, and defined "a renting of a tenement of ten pounds hired and occupied for a whole year" as a ground of settlement.[1] After further changes the leading characteristic was in 1830 and 1834 still further defined, and many particulars added, and on those two statutes this kind of settlement now wholly turns, if indeed it be ever again called into requisition. It was a settlement, which was the basis of long litigation.[2] Under its group of enactments the difficulties arose, as to what was meant by a person—what by a tenement—what by inhabiting and occupation—what by a yearly value of ten pounds. Each word gave rise to keenly contested objections. The later enactments superadded other details, such as, that the occupation must be by a yearly hiring, and rent must be paid for a whole year at least, or to a certain amount at least, and lastly, one must also have been assessed to the poor rate, and have paid the same for a whole year at least. A great variety of decisions had tested every word and phrase of the complicated enactment. Thus it was held, that if a third party paid a poor man's rent for him, this prevented him acquiring the settlement, the courts treating

[1] 59 Geo. III. c. 50.

[2] The statutes in 1831 and 1834 at length settled the details of this ground of settlement as follows, and they deserve to be preserved as an example of means ill adapted to the end :—"No person shall acquire a settlement in any parish or township maintaining its own poor, by or by reason of such yearly hiring of a dwelling-house or building, or of land, or of both, unless such house or building or land shall be actually occupied under such yearly hiring in the same parish or township by the person hiring the same for the term of one whole year at the least, and unless the rent for the same to the amount of ten pounds at the least shall be paid by the person hiring the same. And where the yearly rent shall exceed ten pounds, payment to the amount of ten pounds shall be deemed sufficient for the purpose of gaining a settlement."—1 Will. IV. c. 18.

"But no settlement shall be acquired or completed by occupying a tenement unless the person occupying the same shall have been assessed to the poor-rate, and shall have paid the same in respect of such tenement for one year."—4 & 5 Will. IV. c. 76, § 66.

it as a kind of fraud on the parish;[1] so if the poor man sublet part of his tenement he also lost the settlement;[2] but not if he borrowed money to pay his rent.

Settlement by paying parochial rates.—Among other tests for separating the poorer classes from paupers, and exempting persons from removal, it was in 1690 enacted as a rule, that if the poor person had inhabited a town or parish, and had been charged with, and paid his share of the public taxes or levies, he should be deemed to have a legal settlement there.[3] This ground of settlement was held by the courts to be created, because it was thought a ready means of making the fact known of the pauper's inhabitancy, but this was probably only an ingenious invention, to give a popular and rational account of a subject which required much justification, whether at the hands of the legislature or the courts.[4] At first it was of no consequence what was the rent or annual value of the tenement, for which the taxes were paid, but in 1795 the legislature enacted, that the tenement must be of ten pounds' yearly value. Again, in 1825, the words "parochial rates" were substituted for "public taxes."[5] By the act of 1825, further ingredients of this settlement were added.[6] And it was decided that a poor man did not gain a settlement, if a third person paid his taxes for him.[7]

Settlement by serving a public office.—A ground of settlement also once existed, which turned on the pauper having served a public annual office in a parish. This settlement was created in 1691, and was abolished in 1834.[8] It served as a fruitful ground of controversy, the meaning of "a public office" being just vague enough to invite endless disputes. During the 140 years it existed, the courts had settled, that a crier and bellman, a parish clerk, a hog-ringer was—but that an ale-taster, an organist of a chapel, a schoolmaster of a charity school, a curate of a sequestrated benefice, was not—a public officer.

[1] R. v Tiverton, 30 L. J., M. C. 79. [2] R. v Berkswell, 6 A. & E. 282. [3] 3 W. & M. c. 11, § 6. [4] R. v Llangammarch, 2 T. R. 628. [5] 3 W. & M. c. 11, § 6; 35 Geo. III. c. 101, § 4; 6 Geo. IV. c. 57. [6] 6 Geo. IV. c. 57; 4 & 5 Will. IV. c. 76, § 66. [7] R. v Bengeworth, 23 L. J., M. C. 124. [8] 3 W. & M. c. 11; 4 & 5 Will. IV. c. 76, § 64.

Derivative pauper settlements.—Over and above the original or substantive settlements, there were some derivative settlements invented by the courts. The original settlements were such as were acquired by men, single women, and apprentices. But there were still two important variations caused by infancy and marriage. Children and married women had been altogether forgotten by the legislature, and at least were not expressly mentioned. And yet it was impossible to assume, that classes so numerous were to go without a settlement altogether. The courts of law had here to come to the aid of the legislature, and do, what they have often to do, namely, to supply by implication, or reduce to certainty, what the legislature has overlooked or left doubtful.

Derivative settlement by parentage.—In the early statutes, before a poor law was finally established in 1601, there was always an allusion to the parish, where vagrants were born, as the proper parish for them to remain in and get support; and this was a radical notion, which the act of Elizabeth did not displace, though it did not expressly notice. Till the time of William III., it was not quite settled, whether a child must be deemed to be settled in the parish where it was born, or whether its settlement must shift with the father's settlement. The latter alternative came to be accepted as settled.[1] And this rule now applies to all legitimate children till the age of sixteen, for these acquire and retain the settlement of the father or widowed mother.[2] In regard to illegitimate children, these also follow the settlement of the mother till the age of sixteen.[3] And if a child above sixteen cannot trace the father's or mother's settlement without inquiring into the parent's own derivative settlement, then such child may always fall back on the parish of his or her own birth, till some other settlement shall be acquired.[4]

Settlement of woman acquired by marriage.—The case of a married woman's settlement was another, which was not expressly dealt with in the early poor law statutes, and which courts of law had to work out by a species of deduction founded on the unity of the interests of man and wife. The rule adopted was, that, when a woman marries,

[1] Fort. 313; Comb. 380. [2] 39 & 40 Vic. c. 61, § 35. [3] Ibid.; 4 & 5 Will. IV. c. 76, § 71. [4] 39 & 40 Vic. c. 61, § 35.

the husband's settlement becomes her own, or suspends hers, if she had one. And it was a consequence that her settlement varied with his, as she was deemed incapable of acquiring one in her own right while he had one. That the wife's settlement was only suspended and not merged in the husband's settlement appeared in further developments of the rule, for if the husband was a foreigner without a settlement, or had none of his own, then her maiden or antecedent settlement was retained. And the same was the case, where the husband's settlement was unknown, for this was deemed the same thing as if he had none.[1] The chief importance of this doctrine as to the wife's settlement following the husband's arose, when it was necessary to remove the wife and children. If the husband was living with the wife, she could not be removed to her maiden settlement, without his consent; though if he was absent, she could.[2] And latterly there were statutes to provide for wives of Scotchmen and Irishmen, who had and could have no birth settlements.

Settlement by reason of birth in the parish.—The last settlement to be noticed is that by reason of birth, which, as already observed, was one which first of all occurred. The law has indeed never laid down the rule, that the place of birth of itself will be preferred as the place of settlement, but merely that in those cases where other grounds fail, the pauper can always resort to his place of birth as the last resource for ascertaining a settlement, provided such birth took place in England. Hence the place of birth has sometimes been said to be a *primâ facie* settlement liable to be displaced by the other grounds before mentioned, though it would be more correct to call it a resultant settlement, on which when all other settlements fail, persons can always fall back.[3] Hence if the parents are foreigners or Scotch or Irish, or cannot be proved to have had any other English settlement, the child is deemed settled where it was born. And from this it will be seen, that a settlement is not a necessary characteristic of a British subject, for it is quite possible, that a person may not have acquired any one of the foregoing settlements and still cannot fall back on a birth settlement, for the simple

[1] R. *v* Birmingham, 8 Q. B. 410. [2] R. *v* Cottingham, 7 B. & C. 615. [3] R. *v* All Saints, 14 Q. B. 219.

reason, that he was not born in an English parish. And there were a few nonparochial places in England, which did not count as a foundation even for a birth settlement.[1]

The rule as to birth settlements applied to illegitimate children as well as to legitimate children, for as in the eye of the law a bastard has neither father nor mother, it could not have a settlement by parentage.[2] And this rule as to the settlement of illegitimate children by birth was varied in cases of hospitals, prisons, and workhouses which were provided for by statutes.[3] It sometimes happened, that a child was born in course of the removal of the mother from one parish to another, in which case the child was deemed settled in the parish to which the removal was about to take place; and if fraud was used by a parish officer to remove the mother, the birth was deemed still to be in the parish on which the fraud was attempted.[4] Though, however, an illegitimate child was deemed to be settled in the place where it was born, this rule was altered by statute to a limited extent in 1834, and after that date the rule was, that the child followed its mother's settlement (if any) till it was sixteen, or till it acquired a settlement in its own right.[5] And since 1876 the bastard child now retains the mother's settlement until it acquires one in its own right, and if the mother had none but a derivative settlement, then the child falls back on the place of its birth.[6] Hence also, though the bastard child's settlement will vary with the mother's from time to time, while its age is under sixteen and the mother lives, yet when that age is reached, such settlement will be no longer that of the mother, but that of the place of birth, until the child shall obtain another. The statutes merely confer an ambulatory settlement on the child for the first sixteen years of its life, to prevent unnecessary harshness in separating it from the mother.[7]

Removal of paupers from one parish to another.—As the first organisation of relief to paupers was based on the maxim that the inhabitants of each parish should maintain the paupers found within its limits, it soon became obvious

[1] R. *v* Oakmere, 5 B. & Ald. 577. [2] R. *v* Mattersey, 4 B. & Ad. 211. [3] 54 Geo. III. c. 170, §§ 2, 3. [4] R. *v* Mattersey, 4 B. & Ad. 211. [5] 4 & 5 Will. IV. c. 76, § 71. [6] 39 & 40 Vic. c. 61. § 35. [7] Ibid.

that this rule, assuming it to be just and proper, or the least objectionable, would cease to be just, if paupers from one parish could move at will into another parish, and so increase indefinitely the burden thus undertaken. A check was soon devised for this evil, and the check was to give to the overseers of each parish the power of removing those new comers into their parish, who either were already destitute, or were hovering on the verge of destitution. The statute of Charles II. in 1662, laid down the rule on the subject, and enacted that within forty days after a person came to settle in a parish, in a tenement under the yearly value of ten pounds, the overseers might apply to a justice of the peace to grant a warrant for the removal of such person to his parish of settlement, unless he gave sufficient security for the discharge of the parish.[1] What was meant by "the parish of settlement" then, and what has been so considered under later statutes, modifying the first meaning of those words, has been already explained. Another statute in 1795 put a further restriction on this large and arbitrary power of removal, by requiring that no poor person should be removed until he or she had become actually chargeable.[2]

Under these statutes it is essential that the pauper be at the time of removal residing in the parish, though whether permanently or not is immaterial;[3] that the guardians must apply for his removal;[4] and that he has become actually chargeable, by which is meant, that he has applied for and received relief from the parish.[5] At one time an unmarried woman when pregnant of a child was declared to be *ipso facto* "actually chargeable," but that sweeping enactment was repealed in 1834.[6]

Removal of married women.—The mode of dealing with wives and children, sick persons, and some others, requires to be specially noticed, as their case is obviously a variation of the common lot of adult persons. The rule was soon established, that where a wife resides with her husband, whether he has a settlement in the parish or not, she could not be removed apart from her husband.[7] Yet inas-

[1] 13 & 14 Ch. II. c. 12. [2] 35 Geo. III. c. 101, § 1. [3] R. v Rotherham, 2 Q. B. 557 n. [4] R. v Bedingham, 13 L. J., M. C. 75. [5] R. v Ampthill, 2 B. & C. 847. [6] 35 Geo. III. c. 101, § 6; 4 & 5 Will. IV. c. 76, § 69. [7] R. v Stogumber, 9 A. & E. 622.

much as he might have no settlement at all, and so be irremovable, she might with his consent be removed apart from him to her maiden settlement.[1] But where the wife had been abandoned by the husband, or where he had died, she might be removed to the place of the husband's settlement if he had one, or failing his settlement, then to her maiden settlement.[2] And a deserted wife is now subject to the same privilege from removal as a widow, subject to the contingency of the husband returning;[3] yet her children may in peculiar circumstances be removable.[4]

In order to avoid the hardship of separating a pauper family, consisting of man and wife and children, it was in 1846 enacted, that no person should be removed from any parish in which such person shall have resided five years —but which is now reduced to one year; and whenever a person shall have a wife, or children, having no other settlement than his or her own, such wife and children should be removable, when he or she was removable, and should not be removable when he or she should not be removable.[5]

Removal of children.—The same act which thus identified the wife with the husband, identified the children with the parent, whether husband or widow, who was head of the family, and made it necessary to remove the whole members of the family together.[6] And no child under the age of sixteen years, whether legitimate or illegitimate, residing with a father or mother, stepfather or stepmother, or reputed father, shall be removed where such parent is not removable.[7] And where such child, residing with a surviving parent, is left an orphan, and the parent was at death irremovable, the orphan shall also be deemed irremovable on the ground of residence.[8] For the purpose of this statute, if a child, insane or unable to take care of herself, had lived in family with her parents, she was deemed on the same footing as a child under sixteen.[9]

Removal of sick persons.—When relief is made necessary

[1] R. v Eltham, 5 East, 113. [2] R. v Cottingham, 7 B. & C. 615. [3] 24 & 25 Vic. c. 55, § 3; 29 & 30 Vic. c. 113, § 17. [4] R. v St. Mary, L. R., 5 Q. B. 445. [5] 9 & 10 Vic. c. 66, § 1; 11 & 12 Vic. c. 111; 28 & 29 Vic. c. 79, § 8. [6] 9 & 10 Vic. c. 66; 11 & 12 Vic. c. 111. [7] 9 & 10 Vic. c. 66, § 3. [8] 24 & 25 Vic. c. 55, § 2. [9] R. v St. Mary, 1 B & S. 890.

by sickness or accident, the pauper cannot be removed unless the justices are satisfied that the sickness or accident will be a permanent disability.[1] Sickness in this sense has been interpreted to include blindness, though not pregnancy, and must be personal and not constructive.[2] It is, however, for the justices to decide conclusively as to the permanency of the sickness or accident.[3]

Paupers returning after removal from the parish.—Though the removal of a pauper was in practice a compulsory process against the pauper, and was in substance an arrest and conveyance under custody, still he was no longer kept in custody, and was once more a free agent when he reached his parish of settlement, and could remain or again seek new quarters if he chose. Nevertheless, in order that the process of removal might not require too early repetition, it was enacted, that any pauper once duly removed, who, without the consent of the removing union, returned and again became chargeable, thereby became an idle and disorderly person within the meaning of the Vagrant Act, and as such was liable to be imprisoned for one month.[4] Yet so long as the *quondam* pauper avoided becoming chargeable again to the same parish or union, he was beyond the reach of these statutes.[5]

Who obtains removal order, and how.—At first, when a pauper was sought to be removed from one parish to another, this could only be done at the instance of the overseers or parochial officers of the removing parish, for they represented fully the parish for that purpose. No other person could interfere, nor could be listened to by the justices of the peace on such a question; for the court thought it would be a monstrous thing, if every inhabitant might appeal in such a case, and they could not assume the officers would not do their duty.[6] And after unions were created and the expense of maintenance was thrown on the common fund of the union, the duty to apply for and defend removal orders was naturally transferred to

[1] 9 & 10 Vic. c. 66, § 4. [2] R. v Huddersfield, 26 L. J., M. C. 169; R. v St. George, 2 B. & S. 317. [3] R. v St. Mary, 3 B. & S. 432. [4] 5 Geo. IV. c. 83, § 3; 28 & 29 Vic. c. 79, § 7. [5] R. v Fillongley, 2 T. R. 709; R. v Barham, 8 B. & C. 99; Mann v Davers, 3 B. & A. 103. [6] R. v Colbeck, 12 A. & E. 161.

the guardians, as being now the more appropriate representatives.[1] And hence no other person than a parochial or union officer can take the initiative against the pauper with a view to his removal.[2] When the removal order is, however, necessary, the officer proceeds by first obtaining a justice's warrant to bring the pauper and necessary witnesses before two justices of the peace, who take down the examination in writing, a copy of which can be obtained by the parish or union of settlement to which the pauper is sought to be removed.[3] And the courts held that though the presence or examination of the pauper himself was not, in strictness, essential, yet natural justice required, that he should have an opportunity of stating any objections to his own removal.[4] And if he is too ill to attend, a statutory provision authorises a justice to go and take the examination of the pauper and report it to the other justices who have to adjudge the settlement; but they need not recite this proceeding in the final order.[5] The justices are thus the exclusive judges of the sufficiency of the evidence tendered in support of the order of removal.[6] And the main points on which they must be satisfied are, that the pauper was at the time in the union, unless some statute dispenses with this particular; and was actually chargeable and receiving relief. They must also be satisfied, that the alleged settlement parish has been proved. So scrupulous were the courts in allowing justices who were rated inhabitants of the removing parish to act in these removal orders—for they were, so to speak, judges in their own cause—that this objection of incompetency in the justices was expressly taken away by statute.[7] And hence, where a justice was a churchwarden when he made the order, it was held bad, because he was deemed to be both complainant and judge.[8] And the courts require the order of removal to be strictly in conformity with the powers of the statutes authorising it, and describing the names and ages of the paupers; and it must also bear its authority on its face with an enumera-

[1] 28 & 29 Vic. c. 79, § 23; 30 & 31 Vic. c. 106, § 24. [2] Weston v St. Peter's, 2 Salk. 492. [3] 7 & 8 Vic. c. 101, § 70; 11 & 12 Vic. c. 31, § 3. [4] Anon., Comb. 478. [5] 49 Geo. III. c. 124, § 4; R. v South Lynn, 4 M. & S. 354. [6] 11 & 12 Vic. c. 31, § 3. [7] 16 Geo. II. c. 18, § 1. [8] R. v Great Yarmouth, 6 B. & C. 646.

tion of all the main ingredients constituting the basis of jurisdiction, and describing the justices who made it. Petty objections, however, are not allowed to prevail.[1]

Suspending removal order if pauper is ill.—As the pauper is often too ill to travel or to be removed, express power was given in 1795 to the justices making the order to suspend its execution until they are satisfied that it may be safely executed, and this suspension is effected by an indorsement on the order.[2] And the power was not confined to the illness of the father himself, but was extended to the whole family included in the order.[3] The expense of maintenance of the unremoved paupers, after suspension of the order, requires to be reimbursed by the parish or union of settlement,[4] and the pauper while thus remaining cannot thereby acquire a new settlement.[5]

Sending notice and effecting removal to settlement parish.—Full notice of chargeability with grounds of removal and copy of the order must be sent to the settlement parish or union, and the removal cannot be carried out till twenty-one days thereafter,[6] an appeal being competent as in other cases.[7] In this way time for inquiry is secured to the opposite parish or union. And the mode of removing a pauper was at first entirely arranged by the overseers, who personally conducted that matter, till in 1814, power was given to them to employ a proper person to attend to it.[8] And the time of removal was also left very much to the discretion of the same officials.[9] The proper place of reception for a removed pauper is naturally the workhouse.[10]

Appeal against removal of a pauper.—The same statute of Charles II. which created the right of removal, also gave to the parish to which the burden of maintenance was to be transferred a right of appeal; and this remedy had long been the source of great additional expense, as it brought two parties into the field, to fight each other with the common purse, and who were often little disposed to make

[1] 14 Ch. II. c. 12, § 1; 9 & 10 Vic. c. 66, § 4; R. v St. Paul's, 7 Q. B. 533. [2] 35 Geo. III. c. 101, § 2. [3] 49 Geo. III. c. 124, § 3. [4] 35 Geo. III. c. 101, § 2; 14 & 15 Vic. c. 105, § 8; 30 & 31 Vic. c. 106, § 26; R. v Higginson, 2 B. & S. 471. [5] 35 Geo. III. c. 101, § 2; R. v St. John's, 2 A. & E. 548. [6] 11 & 12 Vic. c. 31; 4 & 5 Will. IV. c. 76, § 79. [7] 49 Geo. II. c. 124, § 2. [8] 54 Geo. III. c. 170, § 10. [9] 11 & 12 Vic. c 31, § 9. [10] 9 & 10 Vic. c. 66, § 7.

the least concession.[1] The parties to defend this appeal are the guardians;[2] but the statutes at the same time give the right of appeal to any person or persons aggrieved by the determination of justices. It has been held accordingly, that not only the overseers of the parish of settlement could appeal, but the pauper himself also, as he himself was certainly aggrieved most of all.[3] But as a pauper has seldom funds to defend any right, this right is all but illusory. It was, however, clearly settled that no individual ratepayer, or parishioner, or third person had any right to interfere; and if opposition was to be made, this must be done through the intervention of the parish officers or guardians of the union, if it was made at all.[4] The jurisdiction to entertain these appeals was given to the quarter sessions of the county or division including the removing parish, and not to that of the parish on which the burden was sought to be imposed.[5] And a great many enactments and decisions have been made as to fixing the right sessions for the appeal, as to the notices, and other preliminary requirements.[6]

Removal of Scotch and Irish paupers.—As the law of removal was inapplicable to persons found destitute in England, but who were born in Scotland, Ireland, the Isle of Man, or the Channel Islands, and who had not acquired any settlement in England, a special enactment provided, that when such a person, or his or her legitimate child, became actually chargeable in England, he and his family might be sent by warrant of removal, obtained in a similar way, to his native place; and rules were laid down as to the means and manner of sending them to the nearest port and handing them over to the corresponding authorities for the purpose of being forwarded.[7] And to secure the due performance of this service, it is provided, that every person charged with the conveyance of such pauper, who wilfully deserts the pauper before the latter reach his

[1] 14 Ch. II. c. 12, § 1; 3 W. & M. c. 11. [2] 28 & 29 Vic. c. 79; 39 & 40 Vic. c. 61, § 25. [3] R. *v* Hartfield, Carth. 222; Comb. 478. [4] R. *v* Colbeck, 12 A. & E. 161. [5] 8 & 9 Will. III. c. 30, § 6; 5 & 6 Will. IV. c. 76, § 105. [6] 9 Geo. I. c. 7; 4 & 5 Will. IV. c. 76, § 81; 11 & 12 Vic. c. 31; 12 & 13 Vic. c. 45, § 5; 14 & 15 Vic. c. 105; 28 & 29 Vic. c. 79. [7] 8 & 9 Vic. c. 117, § 2; 10 & 11 Vic. c. 33, § 1; 24 & 25 Vic. c. 76; 25 & 26 Vic. c. 113; 26 & 27 Vic. c. 89.

destination, is guilty of a misdemeanour, and incurs a fine of ten pounds.[1] The expense of removing these persons is borne by the county or borough, if the parish is not in a union and of small population.[2] By the enactment referred to children of Irish or Scotch parents, and English women who marry Irish or Scotch born subjects, may be involuntarily removed to Ireland or Scotland respectively, when the parent or husband becomes destitute and chargeable, and came from such place.[3] And yet after his death, the wife, and also upon their emancipation the children may again or at once acquire or revert to their own settlements, as if nothing had happened in the meantime. The acts in question only apply to cases where the husband and wife are living together, and if the husband has deserted her, she and her children cannot be removed to Ireland and the other places mentioned.[4]

Irremovability of paupers by reason of residence.—The practice of removing paupers to the parish of settlement was, after the lapse of about two centuries, found to operate with harshness. It was seen to cause a sudden disruption of ties between the pauper and the place of his long residence, by remitting him to a place where he must generally have become an utter stranger. The law accordingly was in 1846 altered to this extent, that no person should thereafter be removed, who had resided in the parish for five years next before the application for the warrant of removal. And this period was soon reduced successively to three years, as it is now to one year; and not only one year's residence in the same parish, but even residence in any part of the same union will now prevent altogether any removal from that union.[5] And finally, as already stated, in the year 1876, three years' residence in any one parish or union was made to amount to a settlement in the parish where the pauper resides at the time.[6]

Meaning of residence of a pauper and break in the residence.—The meaning of this word "residence" has given rise to some trouble, but at last it has been held to

[1] 26 & 27 Vic. c. 89, § 4. [2] 8 & 9 Vic. c. 117, § 5. [3] R. *v* Leeds, 4 B. & Ald. 498. [4] R. *v* Irish Poor Law Com., L. R., 5 Q. B. 79. [5] 9 & 10 Vic. c. 66, § 1; 24 & 25 Vic. c. 55, § 1; 27 & 28 Vic. c. 105, § 1; 28 & 29 Vic. c. 79, § 8; 31 & 32 Vic. c. 122, § 34. [6] 39 & 40 Vic. c. 61, § 34.

designate, *primâ facie*, the parish where the person has slept as distinguished from his place of working by day. But it does not necessarily imply a lodging or definite abode, for sleeping on steps and anywhere or anyhow within the boundaries, amounts in this view to a residence within the parish, if it is the nearest approach to a residence as regards the individual relieved.[1] And for a like reason, a living with relatives on sufferance, if reasonably definite, will be deemed a residence with them in the sense of the statute.[2] But where a person sleeps mostly in one parish, and his wife and family in another, especially if this is incidental to his business, then the place of his sleeping is preferred as the criterion of the family residence.[3]

The courts in modern times have much more liberally interpreted this statute as to residence, than the courts did with the service of an apprentice or servant under the older statutes. Though a residence in a place in its ordinary sense means a continuous course of sleeping in a house or lodging, yet it would be preposterous to imply, that occasional absences, such as happen to all men, whether on the ground of pleasure, duty, or business would in the least affect the question, whether the place usually slept in as a home or headquarters is his residence or not. If the person goes away for a night, or many nights, without any intention to adopt a new residence or abandon the old, and then returns, the original residence nevertheless during all the time of this temporary absence is still properly called his residence, and he may well be deemed to have resided accordingly at his headquarters, though bodily absent for part of the time. Yet cases do occur, especially with the poorer classes, where it is impossible to treat this absence as temporary, and it would be more properly described as precarious or speculative. A man goes away for a few days in search of better employment, with no definite intention one way or the other about returning—always willing to take his chance of settling anywhere in a new residence, if it betters his condition; and when it is considered with what ease and despatch a poor man can strike his tent and march to new quarters, carrying all his goods

[1] R. *v* Shoreditch, 6 B. & S. 784. [2] R. *v* Knaresborough Union, 36 J. P. 501. [3] Norwood *v* St. Pancras, L. R., 2 Q. B. 457.

along with him, or even leave them behind as quite immaterial to his main purpose, the difficulty has often arisen, whether in particular circumstances, what is called a break in the pauper's residence in one parish or union will prevent the pauper from counting the time of absence as part of the period of one year necessary to complete this kind of qualification. As the courts have nothing but common sense to guide them in applying the general rule to all the circumstances that arise, and as these circumstances involve so many elements for consideration which must all be weighed one against the other, and a general average struck, much litigation has arisen in these cases, owing to the vagueness of the word "residence." The courts, however, have generally repudiated laying down any rigid rule or test. The usual ingredients in the consideration of this question are—what was the length of the absence—whether at the time of leaving, the pauper had a lodging or a house—how and on what terms he left such lodging or house—and if he had a family, what arrangement he made as regards their lodging—whether at his departure he expressed any intention to return, and on what conditions—and if he did not express any intention, what intention may be reasonably inferred from his acts and conduct while absent—all these things throw light on his intention to abandon the old residence, finally or conditionally.[1] If, on a review of these elements, and others that may appear pertinent, the court is of opinion that the absence was merely temporary, that is, with an intention to return in a definite time, then the break of residence is disregarded; but if the court thinks that his absence was speculative, and that the pauper took his chance of the new residence as a means of bettering his condition, and wholly indifferent about his return, then the break of residence is material in the computation.

In some special cases the legislature has expressly enacted, that an absence for a time shall not operate as a break of the residence, though such time of absence will be deducted from the computation of one year. For example, the time spent as a prisoner, soldier, or sailor, a confined lunatic—a pauper receiving relief—and a removal of a pauper lunatic to an asylum, or the removal

[1] R. v Whitby, L. R., 5 Q. B. 325.

of a pauper, except by order of removal, is not deemed a removal causing a break of residence.[1] And relief to a pauper's child under sixteen, or to a wife, is deemed relief to him, and is reckoned accordingly.[2]

Irremovability of widows and deserted wives.—A peculiarity exists in the cases of wives and widows. Widows are subject to an enactment which states, that no woman, residing with her husband at the time of his death, is removable for twelve months after his death, if she continue a widow.[3] And for this purpose an absent husband who dies is deemed to have been living with the wife at the time of his death.[4] But if the wife herself had not resided long enough to be irremovable, then she was held not protected by this enactment.[5] And the same rule that applies to widows on the above subject has been extended to deserted wives, treating desertion as death is treated in the other case.[6]

How the poor rate is made.—The great object of a poor rate is to fix a scheme, by which the property of the self-supporting classes can be taken from them with the least irritation, and with the greatest impartiality, both these qualities being only phases of the same thing. No person is pleased when compelled to pay money for any purpose; but when compulsion is inevitable, then the next best thing is to make that compulsion the least disagreeable, or in other words, the most fair. Hence, two difficulties present themselves. First, how is the legislature to select the kind of property to be taken, and second, when selected, how is it to distribute the burden in the fairest and most equitable way on that property? The first question is one very much for politicians and political economists. It is enough for the law that one kind of property has been at last selected to bear the burden; and that is real property or land, for it is the occupier of that property that has been made the sole paymaster in respect of it.

The first part of the machinery is to fix the organ or

[1] 9 & 10 Vic. c. 66, § 1; 11 & 12 Vic. c. 111; 12 & 13 Vic. c. 103, § 4.
[2] 4 & 5 Will. IV. c. 76, § 56; R. *v* St. Mary, 3 B. & S. 46; R. *v* St. George, 4 B. & S. 108.
[3] 9 & 10 Vic. c. 66, § 2.
[4] R. *v* East Stonehouse, 4 E. & B. 901.
[5] R. *v* Cudham, 1 E. & E. 409.
[6] 24 & 25 Vic. c. 55, § 3; 29 & 30 Vic. c. 113, § 17.

medium, through which the amount is ascertained. Though the poor rate is now paid almost entirely by the occupiers of real property in the parish, they do not take any part directly in ascertaining and fixing its amount. That is left entirely to the parish officers, the overseers, who, as already stated, are annually either chosen by the inhabitants in vestry, and afterwards approved by the justices, or nominated by the justices themselves. As, however, this is a compulsory and gratuitous office, the overseers' interest can scarcely be otherwise than identical with that of their co-parishioners. As they have no object to gain by increasing the rate, so, if they may feel naturally desirous to reduce it, they have practically no great discretion, being guided almost exclusively by the expense of each previous year in settling the estimate for the next following year. Moreover, the mode by which they are bound to include all real property, and arrive at its ratable value, will be found to be so strictly defined on general principles, that they can scarcely avoid being impartial in the assessment. They are bound to make a rate, and if they refuse or neglect to do so, they can be compelled by mandamus to perform this necessary duty.[1]

On what principle property is to be assessed.—One great object of a poor rate being to adopt a uniform and impartial rate, this involves a rule of ascertaining the ratable value of such property, and applying that rule to all alike, to rich and poor, to large and to small occupations. That rule had been worked out more or less imperfectly by the help of the courts deciding appeals against the rate. And in 1836 the rule so worked out was embodied in words, and laid down by the Parochial Assessment Act, and later acts, and has been followed out and applied to all kinds of ratable property.[2] That rule is, that no rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated. This net annual value is made on the rent, at which the hereditament might reasonably be expected to be let from year to year, free of all the usual tenants' rates and taxes, and tithe commutation rent-

[1] R. *v* Barnstaple, 1 Barn. 137. [2] 6 & 7 Will. IV. c. 96; 25 & 26 Vic. c. 103, § 15.

charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent. But it was also provided, that nothing shall be construed to alter or affect the principle of different relative liabilities (if any), according to which different kinds of hereditaments were then by law ratable.[1]

By this definition the rent actually paid by the occupier is not made the sole criterion, for though it is always a useful guide, yet rent on a long lease will generally be under the value which premises would have when let from year to year; and moreover, the rent so fixed may be a wise or foolish bargain. Hence in cases where the rent has been slavishly adhered to as the criterion of annual value, the courts have declared the valuation wrong. It is, however, the rent when the property is let from year to year, and not the average rent over a series of years, that is to be looked to. Hence the income of property, when in the occupation of companies, though a fair criterion of annual value, yet must be the income of the particular year, irrespective of average years. And thus a cemetery company will be rated for sums derived from graves paid for during that year, though for many years to come as many may not be sold.[2] The cost necessary to maintain the premises is also mentioned as a deduction; and this may require in a variety of circumstances to be regarded, as where it is necessary to renew property which is liable to perish, or to protect lands from flood and similar outlay.[3] Moreover, in large establishments belonging to companies, and managed by directors, it has been held, that no deduction from the annual value is allowable in respect of sums paid to directors and auditors for attending the board;[4] but a sum for remuneration of the management, and the skill and judgment required, may be deducted, if the business is so large as to require a manager.[5] And lastly, the amount of profits which are made on the premises has little or nothing to do with the ratable value, for this does not depend, at least in general, on the

[1] 6 & 7 Will. IV. c. 96, § 1. [2] R. v Abney Park, L. R., 8 Q. B. 515. [3] Gainsborough v Welch, L. R., 7 Q. B. 64. [4] R. v St. Giles, 14 Q. B. 571. [5] R. v Southampton Dock, 14 Q. B. 587.

occupation of the premises, but on the skill of the tenant, which is altogether a different matter.[1]

Form of the poor rate.—In order to ensure some regularity in the proceeding, the central authority has since 1834 prescribed a form for making a poor rate, the principal characteristic being, that it shall bear on the face of it, when and for what time the rate is made, and at what percentage, by what authority, and for what purpose. For where a man's property is taken against his will, the least that can be done is to tell him these particulars. And this is carried out by specifying each separate property, the name of the occupier and of the owner, the description and situation of the property, the extent of it, the gross estimated rental, its ratable value, and the rate per pound of such ratable value. A failure to sign the rate and comply with this form in any substantial point renders the rate a nullity.[2] And as political and municipal rights are now in a great degree dependent on occupation as well as ratepaying, it is not only the duty of the overseer to insert the name of the occupier in every rate, but he is liable to a fine of two pounds for any wilful neglect in this respect in reference to each person omitted.[3] Thus where some miners were allowed to occupy cottages in connection with their services in the mine, though their master paid the rates, it was held that they were, with a view to exercising the parliamentary franchise, entitled to have their names entered in the rate-book as the occupiers.[4]

Consent of justices to poor rate.—When a rate is made, it is necessary that it should be made with the consent of two justices of the peace, who sign it.[5] This is indeed little else than a form, for it is beyond the province of such justices to inquire into the correctness of the rate or its details, and hence their signing the rate is merely a ministerial act.[6] But their allowance has now this effect, that it conclusively fixes the date of making the rate, which is a point of much practical importance.[7] And the rate when allowed must also be published by affixing a copy

[1] R. v West Middlesex Waterworks, 1 E. & E. 716. [2] 32 & 33 Vic. c. 41; 6 & 7 Will. IV. c. 96, § 2; Eastern Co. v Moulton, 5 E. & B. 974. [3] 32 & 33 Vic. c. 41, § 19. [4] Smith v Sedghill, L. R., 10 Q. B. 422. [5] 43 Eliz. c. 2, § 1; 6 & 7 Will. IV. c. 96. [6] R. v Yarborough, 12 A. & E. 416. [7] 32 & 33 Vic. c. 41, § 17.

on the principal door of all the churches and chapels of the parish before divine service on the next Sunday. This also is a formality which the courts enforce literally so that the rate is null and void if such publication is not carried out.[1]

Binding nature of poor rate.—When a rate is published, it is then valid and binding on all persons; and even the overseers themselves cannot afterwards alter it. If they find out anything defective in it, and wish it to be quashed, their proper course is to appeal against it, and this they may do without consulting the inhabitants in vestry.[2]

Characteristics of poor rate as to impartiality, &c.—One characteristic of a poor rate is, that it should be made for a short period only, for circumstances change, and neither more nor less than the needs of the agreed period should be levied by the overseers. The statute of Elizabeth gave a wide discretion and contemplated even weekly rates, though much longer terms have been in practice adopted, namely, for a half year or a whole year at a time.[3] But anything like a standing rate to continue for several years is contrary to the radical notion of a rate, and will be treated as void.[4] And hence a rate must always on the face of it show for what period it is made.[5] It is now indeed competent to make a rate payable by instalments, but this fact must be plainly stated on the face of it.[6]

Another essential characteristic of a poor rate is, that it shall be prospective and not retrospective, that is to say, it shall be levied in advance, so that all persons may have an opportunity of disputing it if erroneous without much disturbance to so urgent a business. It is on this account that it is made a rule, that a retrospective rate is bad in law.[7] But in exceptional cases, as for example, to reimburse an overseer who has been out of pocket, or to pay a debt, a retrospective rate may be allowed if made within

[1] 17 Geo. II. c. 3, § 1; 1 Vic. c. 45, § 2; Burnley *v* Methley, 1 E. & E. 789. [2] R. *v* Cambridge, 2 A. & E. 370; R. *v* Street, 22 L. J., M. C. 29; 18 Q. B. 682. [3] Durrant *v* Boys, 6 T. R. 580. [4] R. *v* Audley, 2 Salk. 526. [5] R. *v* Eastern Counties, 5 E. & B. 974; 32 & 33 Vic. c. 41, § 14. [6] 32 & 33 Vic. c. 41, § 15. [7] R. *v* Goodcheap, 6 T. R. 159; Waddington *v* City of London Union, 1 E. B. & E. 370.

at the most twelve months.[1] And for this reason a corresponding duty lies on the guardians to discharge promptly all the debts incurred by them during their management.

Another characteristic of a poor rate is, that it shall be equal or impartial, that is to say, it shall fall upon all occupiers of real property who are liable, and that in an impartial manner and according to the same principle of computation.[2] The Parochial Assessment Act of 1836 lays down the rule applicable, so as to ascertain the ratable value, and all else is more or less mere arithmetical computation; in some local acts however a distinction has been drawn by the legislature itself, and if so must be the only guide. If any one is overrated or others are underrated, it will be a good ground of appeal.[3]

In order that all parties may have full knowledge of their liabilities, and time to consider how a poor rate affects them, it is by statute the absolute right of a ratepayer to inspect and take copies of the rate without payment, and the overseers or other officers are liable to penalties for refusing access to, or denying inspection of the rate, at all reasonable times.[4]

Valuation of property as a basis of poor rate.—In order that parishes may not too sluggishly adhere to old valuations, a power was recently conferred on all guardians of unions or parishes with leave of the central board to appoint a new valuation to be made at the expense of the parish, and all premises of ratepayers may be entered and examined for that purpose.[5] Besides this general power a committee of guardians of all unions is now appointed as a matter of course, called the assessment committee, whose duty it is to revise the rate book as regards its valuation, and see that no class of property is underrated and nothing is omitted.[6] They must keep books of their proceedings, which are open to the inspection of ratepayers without a fee.[7] They may call for production of all parliamentary and parochial assessment books which are not directed by

[1] 41 Geo. III. c. 23, § 9; 22 & 23 Vic. c. 49, § 1; Baker *v* Billericay, 2 H. & C. 642. [2] R. *v* Lackenham, Bott. [3] 43 Eliz. c. 2, § 8; 17 Geo. II. c. 38. [4] 6 & 7 Will. IV. c. 96, § 5; 17 Geo. II. c. 3; Tennant *v* Cranston, 8 Q. B. 707. [5] 6 & 7 Will. IV. c. 96, § 4. [6] 25 & 26 Vic. c. 103. [7] Ibid. § 11; 32 & 33 Vic. c. 67, § 69.

statute, like the income-tax returns, to be kept private.[1] The main business of this assessment committee is to see, that the valuation list is correct as regards each and all the parishes within their union, and to employ, if necessary, competent persons to assist them in this inquiry, and to enter in the list from time to time houses newly erected.[2] They hear and dispose of objections to this list,[3] the ratepayers being always entitled to inspect the same without fee.[4] When a valuation list has been thus settled, the overseers are bound in future rates to follow such valuation list.[5] And this list regulates the ratable value of the different parishes in all questions of contribution to the common fund.[6] And when the list is deposited in the proper place, it may again be examined at this stage by any ratepayer for a small charge, and in the metropolitan district without payment.[7] And in order to prevent the vexatious expense of appeals against poor rates, it is now provided, that before any ratepayer can appeal against the rate, he must first apply for redress to the valuation committee, and state all his grounds of objection to the rate, so that they may give him redress, if possible. And it is only after failure of such redress, that the appeal can be prosecuted before the special or quarter sessions in the ordinary way.[8]

Owing to the general similarity of circumstances of all the parishes within the jurisdiction of the Metropolitan Board of Works, a Metropolitan Assessment Committee was appointed in 1864, giving similar powers as to the valuation of property within that large area, and there is an appeal to a court of Metropolitan Assessment Sessions, consisting of selected justices of the peace, who have the powers of a court of quarter sessions.[9]

Rate in aid of neighbouring parishes.—The principle on which the poor rate is based is, that each parish shall raise by means of a rate all sums necessary to maintain

[1] 25 & 26 Vic. c. 103, § 13; 26 & 27 Vic. c. 33, § 22. [2] R. *v* Malden, L. R., 4 Q. B. 326, 10 B. & S. 323; R. *v* Richmond, 6 B. & S. 541. [3] 25 & 26 Vic. c. 103, § 18. [4] Ibid. § 17. [5] 25 & 26 Vic. c. 103, §§ 28, 40; 27 & 28 Vic. c. 39, § 11. [6] 25 & 26 Vic. c. 103, § 30. [7] Ibid. § 31; 32 & 33 Vic. c. 67, § 69. [8] 27 & 28 Vic. c. 39, § 1; R. *v* Kent, L. R., 6 Q. B. 132. [9] 27 & 28 Vic. c. 39; 32 & 33 Vic. c. 67, § 23.

the poor that are found within its boundaries. But no limit as to the amount of such rate was fixed, because it is impossible to foresee the extent of relief required in particular exigencies, or to set any bounds to the burdens on real property which may thereby be created. As want and destitution are variable quantities, so the burden on the real property must vary accordingly. The statute of Elizabeth, it is true, took the precaution to say, that if the justices were satisfied that sufficient funds could not be raised in one parish, then the justices may rate other parishes in the same hundred to relieve the poor of the overburdened parish; and if the hundred failed, then the justices at quarter sessions may resort to other parishes in the same county. At the most therefore, in case of any unusual demand affecting one parish, the other parishes in the same county may be called on to contribute towards the relief. But there is no power to resort to any other parishes out of the same county, and it must be left to parliament to deal with any overwhelming emergency, calling for equalisation of taxation over any larger area than the parish. So great is this discretion as to a rate in aid, that the justices may even select some of the ratepayers of the adjoining parishes without rating the whole inhabitants.[1] And the rate in aid is not made like the ordinary rate, at so much in the pound, but is made to raise a fixed sum, and it must appear that the rate is to continue no longer than when such sum shall have been made up.[2]

Appeal against poor rate.—Owing to the improved spirit in the modern machinery of a valuation committee, an appeal against a poor rate on the ground of inequality, unfairness, or incorrectness in the valuation is rare. When it is competent, it is made to a special sessions, which the justices of each petty sessions are bound to appoint after due notice for four occasions each year.[3] Such special sessions is prohibited from inquiring into the liability of the hereditaments to be rated. An appeal is next allowed however to the quarter sessions as in other cases.[4] The statute of Elizabeth gave power to all aggrieved persons to

[1] R. *v* Knightley, Comb. 309. [2] R. *v* St. Mary's, 2 Str. 700. [3] 6 & 7 Will. IV. c. 96, § 6; 7 & 8 Vic. c. 110, § 70. [4] 6 & 7 Will. IV. c. 96, § 7; R. *v* Trafford, 15 Q. B. 200.

appeal against a poor rate to the quarter sessions.[1] But a reasonable notice of such appeal was required in 1743 to be given to the overseers.[2] And though it is only those who have been rated and aggrieved thereby who can appeal;[3] yet, where a principle is involved which affects third parties, an arrangement may in some cases be made for dividing the costs among several so affected.[4]

Mode of collecting and enforcing payment of poor rate.— It was at first the duty of the overseers to collect the rate, but in large parishes an assistant overseer or a collector has mostly been appointed at a salary to perform this duty. The first step in the recovery of a poor rate is to demand the rate, for until then the occupier does not know what he has to pay. This demand must be made on the occupier either personally, or by leaving a written note of the amount with some inmate at the dwelling house of the ratepayer.[5] If the occupier or person liable do not reside on the premises, or if his place of abode be unknown, a written demand may be left with the person in possession or affixed to the premises.[6] And as a poor rate is made payable immediately, and the rate is deemed to be made, as already stated, from the date of its allowance by justices, the demand may be made any time after that date. If the rate is not paid on demand or within seven days, the remedy is for the collector or overseer to apply to two justices of the peace for a warrant to distrain the goods of the ratepayer.[7] It is enough that goods of the ratepayer be found anywhere within the county, in order to justify the distress; or if none is found in the county, then on oath the justices of another county may certify the same, and grant a warrant to be executed in such other county.[8] The form of summons is regulated by statute, and a form of distress warrant is given by statute, and the ratepayer pays the cost of executing it.[9] And if the ratepayer pay the rate after the warrant is issued, before a levy has been made, he must pay the expense of the officer who goes to levy.[10] In hearing an application for

[1] 43 Eliz. c. 2, § 4. [2] 17 Geo. II. c. 38, § 4. [3] R. v George, 6 A. & E. 305. [4] 11 & 12 Vic. c. 91, § 11; 31 & 32 Vic. c. 122, § 29. [5] Hurrell v Wink, 8 Taunt. 369. [6] 31 & 32 Vic. c. 122, §§ 39, 40. [7] 43 Eliz. c. 2, § 2; 54 Geo. III. c. 170, § 12. [8] 17 Geo. II. c. 38, § 7. [9] 12 & 13 Vic. c. 14. [10] 39 & 40 Vic. c. 61, § 31.

the distress warrant referred to, the duty of the justices is ministerial and not judicial; that is to say, all that they have to be satisfied about is, that the rate is on the face of it good, and that it has not been paid; and they cannot inquire as to the merits of the complaint, such as, that the ratepayer is not the occupier of the property, or that he has been overrated; for these are proper grounds of appeal.[1]

If there are no goods to be distrained, or not sufficient to cover the amount required, the justices may then, but not before, issue a warrant of commitment, under which the ratepayer may be committed to prison for three calendar months. But during such time he can be released on payment of the sum required, and of the costs up to that date.[2] And imprisonment for nonpayment of a poor rate, when it is competent, is deemed to be a commitment in the nature of civil and not criminal process, whatever benefit may arise from that consideration.[3]

Out of what property the poor rate is levied.—The mode of providing the funds, out of which paupers were to be relieved, was declared by the statute of Elizabeth; and real property was not at first exclusively contemplated as the taxable fund. And though most kinds of real property were enumerated, still there were a few omissions.[4]

How far personal property ratable.—As the statute of Elizabeth described "all inhabitants" of the parish as liable to be rated, the courts had to put some definite meaning on those words; and they determined that inhabitants meant persons who usually slept in the parish. But this was not enough. The courts also held, that persons sleeping in the parish were not necessarily ratable as inhabitants, unless they had some visible stock in trade, out of which they derived a profit, such as keepers of shops or owners of ships, while those who merely had furniture in a house, but which yielded no profit, or who exercised a profession, or acted as clerks, deriving their

[1] R. v Paynter, 7 Q. B. 255. [2] 12 & 13 Vic. c. 14, § 2. [3] R v Whitecross, 6 B. & S. 371.

[4] The words were, "Every inhabitant, parson, vicar, or other—and every occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines, or saleable underwoods in the same parish."—43 Eliz, c. 2, § 1.

livelihood from other sources than personal corporeal property, were not ratable. At length a notion grew up, that visible property was the criterion of ratability; and this obviously included personal as well as real property. The liability of personal property to poor rate continued to be the law, or was supposed to be such, for nearly two centuries and a half, though it was seldom enforced, owing to the uncertainty of ascertaining the ratable sum. Hale said the usage had been not to tax personal property. Lord Mansfield also demonstrated the essential looseness of the foundation on which stock in trade was sought to be rated; and said that mankind had, as it were, with one universal consent refrained from rating it, on account of the enormous difficulty of fixing the ratable sum.[1] For if the doctrine of visible property were acted on literally, the watch in a man's pocket would be ratable; and a shoemaker would be taxed, while the tailor (who used then to keep no stock in trade) would go free. Yet the courts soon after recurred to the first idea, and in Lord Kenyon's time held, that stock in trade was ratable if it was the property of the person in possession, and was productive.[2] And the rule became settled, that personal property, if visible and profitable, was ratable; and further, that if a rate omitted stock in trade, it would be quashed.[3] The legislature, however, interposed, and since 1840 has annually continued an enactment expressly exempting personal property from being rated to the poor.[4]

Exemption of crown property from poor rate.—In determining the question, who is an occupier of lands within the meaning of the Poor Law Acts, the first distinction made was, that as the crown was not mentioned in the statute, it followed that the crown was not taxable, and hence that all buildings devoted to the public service, and which

[1] R. *v* Ringwood, Cowp. 326. [2] R. *v* Darlington, 6 T. R. 468.
[3] R. *v* Lumsdaine, 10 A. & E. 157.
[4] 3 & 4 Vic. c. 89 (continued annually). Political economists have pointed out, that by putting a poor rate on occupation of land, the landlord is the person who, in the end, pays it; when put on occupation of trade premises, the rate is paid really in part by the employer and partly by the employed; and when put on occupation of houses, it is paid partly by the occupier, and partly by the owner of the site, but chiefly by the occupier.—*Fawcett, on Poor Laws.*

were occupied for the purposes of government by the servants of the crown, such as the post office, government offices, Woolwich dockyard, and others, were exempt from the poor rate.[1] And the same principle was held to extend to lands and buildings, not held directly by the servants of the crown, but held by others solely for the purposes of local government or justice: such as county police stations, or assize courts, or prisons, or asylums. These also were exempt from the poor rate, as well as houses occupied for the sole purpose of the officials residing there, and so far as they afford only reasonable accommodation to such officials.[2] This exemption is thus not confined literally to those buildings only, which are directly connected with government, if the crown and the servants of the crown occupy solely for some purpose of imperial concern, which for this purpose may be deemed a government purpose; as, for example, a geological museum,[3] a county court,[4] a national gallery.[5] And in like manner, where servants of the crown occupy premises belonging to a private owner, these occupiers are exempted for the same reason, at least to the extent to which their occupation is directly necessary to their official duties, and having regard to the rank and family dependent on the officer.[6]

But though crown property is exempt from ratability, this exemption only applies when it is occupied by the servants of the crown for purposes of the crown or of government. Hence the exemption does not apply to the ranger or occupier of a royal park, if he derives profits from inclosed lands there;[7] or to an occupier of apartments in Hampton Court Palace;[8] or to the occupier of any part of a palace for his own benefit, and not as being necessary for the discharge of his duty as a servant of the crown.[9] And this principle of exemption from ratability for government purposes has been declared by the legislature not to extend to property, held by and vested in municipal corporations, for purposes connected with their local affairs,

[1] Mersey Board *v* Cameron, 11 H. L. C. 443. [2] R. *v* McCann, 9 B. & S. 33; L. R., 3 Q. B. 677. [3] De la Beche *v* St. James, 4 E. & B. 385. [4] R. *v* Manchester, 3 E. & B. 336. [5] R. *v* Shee, 4 Q. B. 2. [6] R. *v* Stewart, 8 E. & B. 360; R. *v* Smith, 30 L. J., M. C. 74. [7] E. Bute *v* Grindall, 1 T. R. 338. [8] R. *v* Ponsonby, 3 Q. B. 14. [9] R. *v* Terrott, 3 East, 506.

such property being ratable as if it were held by private occupiers.[1] Nor does it apply to trustees and others, whose powers, though in some sense given for the benefit of the local public, are not connected with imperial government, as local boards of health or local commissioners.[2]

How far owners of property are ratable to the poor.—The statute of Elizabeth directed only occupiers of the lands to be rated to the poor, and hence owners were deemed not to be ratable by virtue of such ownership merely. But this generality is qualified by the doctrine, that, if there is no demise of the land to a third party, then the owner is deemed in most cases to be himself the occupier, and as such ratable; and moreover subsequent statutes have expressly authorised owners to be rated instead of occupiers in a few cases. Thus as houses were often let out in lodgings to poor tenants, whom it was difficult to rate, power was given to the vestry of a parish to resolve, that, instead of the occupiers being rated, the owners or immediate lessors should be rated. But this power was confined to houses or small tenements, let at a rent from six pounds to twenty pounds for less than a year.[3] And though the occupiers of such houses or lodgings ceased to be primarily liable, yet their goods might be distrained for the rates to the extent of their unpaid rent, leaving them the right of deducting such rates as having been paid to account of rent.[4] Again, the owner may in some cases also, if the tenement is under the ratable value of eight pounds, obtain an abatement by voluntarily undertaking to pay the poor rate, or the vestry may resolve to rate him instead of the occupiers.[5] And in all such cases, if the owner do not pay the rates, the occupier's goods may, after due notice, be distrained, and such occupier may treat the sum realised and expense of the distress as payment to account of rent.[6] Moreover if a dwelling house is let out wholly in apartments or lodgings

[1] 4 & 5 Vic. c. 48, §§ 1, 2; Lancashire *v* Cheetham, L. R., 3 Q. B. 14. [2] R. *v* Hull, 4 E. & B. 29. [3] 59 Geo. III. c. 12, § 19. [4] 59 Geo. III. c. 12, § 20.

[5] 32 & 33 Vic. c. 41, §§ 3, 4, 5, 9. And the same as to ratable value in the metropolis of twenty pounds, as to Liverpool of thirteen pounds, as to Manchester and Birmingham of ten pounds.

[6] 32 & 33 Vic. c. 41, § 12.

not separately rated, the owner shall be rated in respect thereof to the poor rate.[1] All such instances of rating the owner instead of the occupier are exceptional, and were introduced for reasons sufficiently obvious.

Occupiers of property are primarily ratable to poor rate.—The occupier of land or houses is thus the person primarily liable to the poor rate, but occupation in this sense is to be distinguished from a mere exercise of some right or the enjoyment of some easement over the land. It is also to be distinguished from that kind of occupation known as a lodging in the house of another, and also from that occupation which is often enjoyed by one while acting as the servant of another. Land being the generic word for ratable subjects, includes all modes of turning the soil to profit, whether as slate-quarries, or clay-pits, or lime-works, or brick-fields.[2] But mines and some others have been specified and treated separately, as will be stated afterwards. Where successive occupiers enjoy the land or house during the currency of a rate, the rate is equitably divided between them, according to the period of time during which each is in occupation.[3] And when a new house becomes occupied during the currency, the new occupier will pay from the date of his entry.[4] And when it is said, that the occupier of a house is the ratable party, it is not meant that he must occupy it personally. One may occupy land or houses by means of servants, and the master alone will be ratable.[5] But it often happens, that a servant is allowed to occupy a house of the master either gratuitously or under reduced wages, corresponding to the value of the occupation; or a house may be hired by a servant at the expense of the master. In these cases the master is ratable, unless the servant has taken the house in his own name and right, in which case he will be able to treat as trespassers all who enter it.[6]

Occupation distinguished from licence and easement.—A further distinction as to occupation must be noticed. A mere licence or easement, or profit *à prendre*, or incorporeal

[1] 30 & 31 Vic. c. 102, § 7. [2] R. v Brown, 8 East, 528; R. v Westbrook, 10 Q. B. 178. [3] 32 & 33 Vic. c. 41, § 16. [4] 31 & 32 Vic. c. 122, § 38. [5] R. v Tynemouth, 12 East, 46. [6] R. v Field, 5 T. R. 587; R. v Wall Lynn, 8 A. & E. 379; R. v Gardner, Cowp. 79.

right enjoyed over the land of another being severed from the possession of that land, such as a right to dig for turf or clay, or to take fish out of another's waters, or to take game on another's land, was held to be a different thing from occupation of the land, which meant an exclusive occupation as distinguished from an intermittent and occasional right to do something upon the land, and hence the owner of such easements or profits is not ratable.[1] In some of these cases, however, as, for example, between occupation and a right of common, the distinction is somewhat fine. In those cases where a corporation or trustees are the nominal owners of land, and burgesses or members of the corporation are allowed to exercise the right of occupation for purposes of pasture over definite portions, the latter have been deemed occupiers, and so ratable in their own right.[2] It has also been held, for example, that, when land is given for a period to enable coprolites to be dug out, this implies such an exclusive occupation as to render the licensee liable to the rate.[3] And in all cases where owners and occupiers by some agreement allow persons to occupy or exercise some powers of occupation over premises, the question usually resolves itself into the one point, whether the agreement in substance amounts to a demise, for if so, then this indicates that the quasi occupier is the real occupier in the eye of the law.[4] As easements, commons, and profits *à prendre* are, however, merely parts of the entire right of ownership or occupation, it is only when they are severed from the occupation, that they are not ratable: when they are blended with or unsevered from the occupation, they will, if separately valuable, enhance the value of the occupation, and in that sense they contribute to increase the ratable value.[5] And an easement may necessarily involve an exclusive possession of the surface of the soil, such as a right of private way held in severalty, and the owner of such way is ratable *pro tanto* in such a case.[6]

Occupiers of lands with sporting rights.—Owing to the

[1] Grant *v* Oxford, L. R., 4 Q. B. 9; R. *v* Jolliffe, 2 T. R. 90. [2] R. *v* Watson, 5 East, 480. [3] Roads *v* Trumpington, L. R., 6 Q. B. 56. [4] L. & N. W. R. Co. *v* Buckmaster, 44 L. J., M. C. 180. [5] R. *v* Battle, 8 B. & S. 12; L. R., 2 Q. B. 8. [6] R. *v* Bell, 7 T. R. 598; R. *v* Mayor of London, 4 T. R. 21.

rule, that profits *à prendre* were not *per se* ratable, it was felt that valuable game, fowling, and fishery rights, which are so often severed from the occupation, escaped rateability altogether. Hence in 1874, a statute expressly declared, that a right or profit *à prendre* in the case of game, wild fowl, or fish, though thus severed, should be ratable in the hands of one or other of the parties interested.[1] By this means justice was done, and occupiers of these exceptional rights taxed equally with their neighbours.

If occupation must be profitable before it is ratable.—Though the occupation must be beneficial, that is to say, of some pecuniary value, it is not meant that the amount of profit made by the occupier on the premises, by his trade or business, is part of the ratable value. All that is meant is, that the premises are well adapted to enable a person to make profits. Hence though an empty house is not ratable, still if, while empty, it is used to store furniture or machinery, it will be rated to the extent of such valuable purpose.[2] While on the other hand, if land is used solely for the purposes of a sewer, and the conditions under which it is so used preclude any profitable occupation, then it is not ratable.[3] Still if there is an occupier, that occupier is ratable, whether or not he make any profit, or derive any advantage from the land or house; it is enough that the subject is capable of being let, at some profit or rent, to a person making an ordinary use of it. One may let his fields go untilled, so that they grow nothing but weeds and thistles, yet he cannot in that way get rid of the liability to contribute to the poor rate, according to the profit or rent which he might derive from using it in the ordinary way, or from letting it to a tenant from year to year, if there are tenants who would rent it.

Profits of statutory and public trustees.—From the time of Lord Mansfield, and perhaps earlier, to the time of Lord Tenterden, an opinion prevailed that if statutory works were made, and the trustees or commissioners derived no personal advantage, in which case the works were con-

[1] 37 & 38 Vic. c. 54, §§ 3, 6. [2] Staley *v* Castleton, 33 L. J., M. C. 178; Harter *v* Salford, 6 B. & S. 591. [3] Metrop. B. W. *v* West Ham, L. R., 6 Q. B. 193.

sidered to be public works, no poor rate could be imposed on such trustees. But that doctrine was declared to be unwarranted by any statute or rule of law; and hence the trustees or managers invested with the occupation of all works of that kind, though popularly called public works, yet not being connected with the purposes of imperial or local government in its strict sense, differ in no respect from ordinary occupiers, and must pay poor rates, irrespective of what they are bound by statute to do with the income.[1] Hence where a statute defines the purposes to which the revenue from statutory works is to be applied, and nothing is said about the poor rates—and even though the whole revenue is expressly disposed of, it is, nevertheless, implied, that out of the revenue the poor rates shall be paid, seeing that this is a necessary and unavoidable consequence of the occupation of land. But if the tenant can only take the property subject to conditions imposed by the legislature, which prevent any profit whatever being made of it, then it is not ratable, as for example a sewer made through lands,[2] or waterworks, of which only a limited profit can under the governing statute be earned.[3] Nor does the mere fact, that property is used for some meritorious public purpose, and without any profit to any individual, exempt it from the poor rate, though it was long so considered by the courts. Since the property must always be occupied by some person or persons, nominally if not beneficially, the rate is now held rightly imposed on such occupiers, whose first duty it is out of their funds to pay the ordinary burdens incident to their occupation. This is so with hospitals and charitable institutions of all kinds; and it is altogether immaterial, whether the managers or nominal occupiers lose money or not by their connection with them.[4] Thus industrial schools were held ratable for the like reasons.[5]

How far churches and chapels are ratable to poor.—Under the older statutes the courts held, that churches were exempt from poor rates, because they were used for

[1] Mersey Board *v* Cameron, 11 H. L. C. 443; Greig *v* Univ. of Edin. L. R., 1 Sc. Ap. 348. [2] Metropolitan Board *v* West Ham, L. R., 6 Q. B. 193. [3] Worcester *v* Droitwich, 45 L. J., M. C. 81. [4] Laughlan *v* Saffron Hill, 12 L. T., N. S. 542. [5] R. *v* West Derby, L. R., 10 Q. B. 283.

public purposes and without profit, and hence only chapels yielding a profit by pew rents were rated. This proceeded partly on the exploded doctrine as to public purposes *per se* conferring immunity. A statute in 1833, however, expressly exempted from liability to the poor rate all churches, district churches, chapels, meeting houses, or premises, or such part thereof as is exclusively appropriated to public religious worship, and which, if dissenting chapels, shall be certified for the performance of such religious worship; but the exemption does not extend to parts of a chapel, not exclusively so occupied (unless for Sunday or infant schools), and which produce a rent or profit.[1] The question as to the ratability of chapels now turns not on the fact of pew rents being received, but on whether and to what extent the chapels are used exclusively for public religious worship as described by the statute.

Ragged and Sunday schools how far ratable.—For a similar reason, ragged and Sunday schools, though not declared by statute to be actually exempt from ratability, yet may, if the parish overseers think fit, be exempted when children are taught gratuitously on Sunday, and without profit; and as to ragged schools, when no profit or benefit arises therefrom except to the teachers. The discretion of the overseers in this matter is, however, absolute, and cannot be controlled.[2]

Scientific institutions how far ratable to poor.—Owing to the meritorious character of scientific and literary institutions, a statute in 1843 expressly exempted from liability to poor rates and similar rates, any land, houses, or buildings, or parts of houses, belonging to any society instituted for purposes of science, literature, or the fine arts, exclusively for the transaction of its business, and for carrying into effect its purposes; provided that such society is supported wholly or in part by annual voluntary contributions, and makes no dividend, gift, division, or bonus, to or between any of its members.[3] Many societies have

[1] 3 & 4 Will. IV. c. 30, § 1.
[2] 32 & 33 Vic. c. 40, § 1; Bell *v* Crane, L. R., 8 Q. B. 481.
[3] 6 & 7 Vic. c. 36. § 2. The question of exemption is first decided by the barrister who certifies the rules of friendly societies, subject to appeal to quarter sessions, and to the usual control of the superior courts.

failed to establish their right to this exemption, owing to their purposes not being exclusively those of the statute, or their rules admitting of some bonus or profit to the members; the purpose contemplated is often amusement and relaxation rather than science or literature, as in the case of such places as news rooms and musical societies.[1]

How far woods are liable for poor rates.—As the statute of Elizabeth specified salable underwoods amongst the things ratable, the courts held, that this impliedly exempted other kinds of woods, such as ordinary wood plantations of all kinds, though the trees were occasionally cut down and sold for timber, and though they were intermixed with oak and other trees intended to produce underwood. And much difficulty was felt in distinguishing salable underwood from underwood, the former being such as periodically, that is, annually, or at stated intervals, produced profit; and if profit was obtained at stated intervals a mode of rating such woods during the intervening years required to be settled.[2] An end was, however, put in 1874 to the immunity of wood plantations from poor rate, by repealing the words in the statute of Elizabeth "salable underwoods," and now all wood plantations are ratable at the value at which the land would let without the plantation; while land used for salable underwoods bear a value proper for that mode of cultivation, and when both purposes are combined, the assessment committee have an option of treating the land as used for either purpose.[3]

How far mines are liable to poor rates.—As the statute of Elizabeth mentioned coal mines among ratable subjects, this was deemed impliedly to exempt all other mines, such as lead, tin, copper, and iron mines. And for many years the courts held that not only were mineral mines exempt, but the piece of surface land at the shaft covered with steam engines and sheds used in connection with the mining was also exempt, either as being part of the mine, or only as accessory to the mine. But this mistake was corrected in recent times, and the surface works were held ratable *per se*, enhanced by the valuable capacity to aid the

[1] Scott v St. Martin's, 5 E. & B. 558. [2] Fitzhardinge v Pritchett, 8 B. & S. 216 · L. R., 2 Q. B. 135. [3] 37 & 38 Vic. c. 54, § 4.

mining operations.[1] In estimating the value of coal mines, which fluctuates, the rent paid is seldom a safe criterion, owing to the common fact of excessive profits and excessive loss often accompanying the occupation: the test is as in other cases, what a tenant would give for the right to work the mine from year to year in its then state. An end was put in 1874 to the anomaly of confining a poor rate to coal mines and exempting all others; and now all mines are alike ratable, subject in some cases to a peculiarity as to the mode of arriving at the ratable value and as to the person who is to be rated.[2] Thus the mode of arriving at the ratable value is declared to be the same as the gross value in respect of a lead, tin, or copper mine when let on lease without fine, and is the amount of the dues or rent payable besides the annual amount of any fixed rent which may not be paid or satisfied by such dues. And other modes are declared to be applicable to meet special circumstances.[3] In cases where the rent of the mine is paid, not as rent, but in the form of a portion of the ore given to the landlord, the tenants and landlord are both ratable in respect of their respective proportions, for both are occupiers *pro tanto*.[4]

How far docks are ratable to the poor.—Land for the purposes of rating includes docks; but as these are usually made under statutory powers, the mode of rating them is affected by the contents of the statutes. *Primâ facie*, the soil covered by the dock being ratable *per se*, it is equally ratable after an improved value has been thus given to it by the dock. If a right to take dues is annexed to the ownership of the docks, these are considered as enhancing the profit, and distributed among the several parishes according to area.[5] The chief difficulty in such cases is to ascertain, whether the right is annexed or not to the occupation of the dock.[6]

How far canals are ratable to poor rate.—Lands for rating purposes also include the bed of canals; and canals

[1] Kittow *v* Liskeard Union, L. R., 10 Q. B. 62. [2] 37 & 38 Vic. c. 54, § 3. [3] 37 & 38 Vic. c. 54, § 7. [4] R. *v* Crease, 11 A. & E. 677; Crease *v* Sawle, 2 Q. B. 862; Van Mining Co. *v* Llanidloes, L. R., 1 Exch. Div. 310. [5] R. *v* Hull, 7 Q. B. 2; 18 Q. B. 325; Watkins *v* Milton, L. R., 3 Q. B. 350. [6] Ipswich Dock *v* St. Peter, 7 B. & S. 311.

being usually made under the authority of a statute, which annexes to the occupation of such canal the right to take tolls, these, though not ratable when separated from occupation, thus form part of the income and are taken into account in estimating the ratable value. Where a canal extends into several parishes, the undertaking is for purposes of rating considered to be one whole, and the gross earnings estimated; and then the income divided and treated as earned in each parish in the proportion of mileage. The place of collecting tolls is wholly immaterial. Nevertheless, if the earnings are unequal, the excess or reduction below the average mileage is credited to each parish according to the result applicable to such parish; and if there are separate buildings or works in one parish which are of independent value, the value of these must be added as part of the ratable value in that parish. The difficulty in such cases is to determine what part of the profit is due to the particular part of the works or to the whole work viewed as one whole.[1] Canal Acts often provide expressly, that the ratability of the canal shall not be affected by the receipt of tolls, but shall be calculated as if the proprietors were occupiers of land and not canal, and such land were deemed of the same value as adjoining lands. In such cases the value of the adjoining land is often enhanced by the canal, but it depends on the language of the statute whether the bed of the canal is thereby ratable at a value higher than it had before the canal was made.[2] And if the canal company carry on a business as carriers, their profits as such are not to be deemed arising out of the occupation of the canal any more than the profits of any other trader.[3]

How far navigation works are ratable.—Land also includes the bed of navigable rivers; and if the management of the navigation is vested in statutory trustees who are occupiers of the soil, or of buildings in a parish, they are ratable so far as they are occupiers of the soil.[4] The

1 Birmingham Canal *v* Birmingham, 19 L. T., N. S. 311. 2 Glamorganshire Canal *v* St. Mary, 29 L. J., M. C. 238. 3 Grand Junction *v* Hemel Hempstead, L. R., 6 Q. B. 172. 4 Severn Commissioners *v* Tewkesbury, 29 J. P. 823; R. *v* Milton, 3 B. & Ald. 112; R *v* Woking, 4 A. & E. 40; R. *v* Mersey, 9 B. & C. 95.

word land includes any convenience annexed to the land, such as a floating pier on a navigable river.[1] But if part of the pier is beyond the boundary of the parish, such part is not ratable.[2]

How far waterworks are ratable to poor.—Land also includes that part of the soil occupied by the pipes or watercourses through which water is conveyed, and the occupiers of the waterworks are ratable in each of the parishes containing such pipes and reservoirs according to the profit earned in each parish.[3]

How far gasworks are ratable to the poor.—Gasworks resemble waterworks in their ratability. Land includes the pipes of gasworks and the buildings used for manufacturing the gas; but as the profit is in the nature of a business carried on upon land, this is not to be considered in estimating the ratable value, which must depend only on the value of the buildings, and of part of the soil occupied, irrespective of such profits, by one who carries on the same manufacture. And a distinction may be made between direct and indirect profits in considering the pipes and apparatus.[4] The gas manufactory includes the retorts, purifiers, steam engines, boilers, and movable apparatus, if fixed to and become part of the inheritance, so as to pass in a demise of the premises.[5] But if the machinery is not fixed to the soil, and, though steadied by resting on the soil, is movable, then its value is not added to that of the building.[6]

How far manufactories are ratable to poor.—In estimating the ratable value of a manufactory, the value of the machinery and apparatus is to be added, if the parts are in the nature of landlord's fixtures, and become part of the inheritance.[7]

How far tithes are ratable to the poor.—The statute of Elizabeth expressly specifies parsons and vicars as liable to be rated; and also specifies among the things ratable, all tithes impropriate and propriations of tithes.[8] And

[1] Forrest *v* Greenwich, 8 E. & B. 890. [2] R. *v* Musson, 8 E. & B. 900. [3] Hampton *v* West Middlesex Waterworks, 1 E. & E. 716; R. *v* Mile End, 10 Q. B. 208. [4] Sheffield Gas Co. *v* Sheffield, 4 B. & S. 135. [5] R. *v* Lee, 7 B. & S. 188; L. R., 1 Q. B. 241. [6] Chidley *v* West Ham, 39 J. P. 310. [7] R. *v* Haslam, 17 Q. B. 220; R. *v* Brinjes, 35 J. P. 456. [8] 43 Eliz. c. 2, § 1.

when a sum of money is by statute given in lieu of tithe, the rector is ratable in respect of such sum.[1] But if the tithe is transferred to a third person without extinguishing the tithe, such third person is ratable.[2] At one time it was held, that the owner of tithe commutation rentcharge was entitled to deduct the curate's salary, if the appointment of a curate was necessary and unavoidable; but it is settled that no such deduction can be made, as there are no words in the acts which authorise it.[3]

How far railways are ratable to the poor.—Land also includes railways, for these involve the exclusive possession of a part of the surface, and necessarily, or at least usually, produce a profit. Where a railway lies in several parishes, though for most of the main purposes it is one undertaking, and is ratable in each parish according to mileage in such parish, yet there are also separate charges not merely arising out of the size and value of the stations and conveniences, but also out of the traffic which may be more remunerative in one parish or district than another. These elements must be taken into account in each case according to the circumstances, so that mileage is only one of the guides to value.[4] And as regards depreciation or repairs, it is always proper to allow a deduction each year corresponding not to the actual outlay, but to the average for several years.[5] And where a railway company has branches, which, taken by themselves, yield no profit, yet this circumstance is not to be taken into account in assessing part of the main line in the parish where such branches are not situated. With respect to such branch line, it will be rated at a smaller sum per mile than the main line;[6] and the branch is not to be increased in value by the fact of the main line being made more valuable thereby.[7] And in assessing a railway company the value of fixtures—such as railway sleepers—is to be added to the various buildings, so far as such fixtures are part of the

[1] R. v Boldero, 4 B. & C. 467; R. v Joddrell, 1 B. & Ad. 403.
[2] R. v Great Hambleton, 1 A. & E. 145. [3] R. v Sherford, 8 B. & S. 596; L. R., 2 Q. B. 503. [4] Great Eastern R. Co. v Haughley, 7 B. & S. 624; L. R., 1 Q. B. 666. [5] Ibid. [6] R. v So. Eastern R. Co., 15 Q. B. 313.
[7] Great Eastern R. Co. v Haughley, L. R., 1 Q. B. 666; R. v Llantrissant, L. R., 4 Q. B. 354.

freehold, and would pass on a demise of the premises.[1] Where one company receives tolls partly as agent for another company on whose lines the money is earned, such tolls are not treated as part of the income or profit of the first company.[2] And in cases, where one company makes a special agreement with another for the joint or partial use of the railway or a station, the main consideration, in ascertaining which of them is ratable, is as to which has the exclusive use as occupier, and which is in the position of a lodger towards the other.[3] And where two companies have running powers over each other's line, each is ratable only for the value of its own portion, enhanced by this power of running over the neighbouring line.[4] Again, where one railway company rents the line of another company at a loss, the rent paid is not to be taken as conclusive of, though an important guide to, the annual value, any more than in the case of other property rented.[5] But when the company receives a rent or consideration from another company for joint use far beyond the value, this is part of the income of such first company, and a guide to the ratable value;[6] though a mere power to levy a toll, which is not exercised, is not to be included as part of the income.[7] And in rating railway stations, these are to be viewed not merely as premises used like an ordinary house or warehouse, but there is superadded an item of value arising out of their capacity to subserve the purpose of a railway.[8] In considering for the above purpose which items of value are to be considered as part of the general earnings of the whole line, including branches, and which are earnings arising out of the stations, and so confined to the parish, it has been held that the general earnings include the terminal charges.[9]

How far tolls are ratable to the poor.—Tolls derived from the use of real property which *per se* is ratable are

[1] R. v Staffordshire R. Co. 30 L. J., M. C. 68; Great Western R. Co. v Melksham, 34 J. P. 692. [2] R. v St. Pancras, 3 B. & S. 810. [3] Leeds R. Co. v Armley, 25 J. P. 711. [4] Great Western R. Co. v Badgworth, L. R., 2 Q. B. 251. [5] R. v Lapley, 9 B. & S. 568. [6] R. v Fletton, 3 E. & E. 450; R. v Sherard, 33 L. J., M. C. 5. [7] R. v Stockton Co. 8 L. T., N. S. 422. [8] R. v Eastern Co. R. Co., 4 B. & S. 58; R. v Rhymney, 10 B. & S. 198. [9] R. v Eastern Co. R. Co., 4 B. & S. 58.

viewed as the income arising out of such property, and therefore a guide to the ratable value. They are generally annexed to the occupation by reason of some statute. And it is immaterial, that the place where the tolls are collected is in another parish.[1] Where tolls are derived from a ferry, the ferry is the principal and the use of the landing place is merely accessory to it; and, as tolls *per se* are not ratable, no one may be rated for a ferry, if the place of collecting tolls is a highway, but if the landing place is exclusively occupied, then it is rated as having a capacity to produce tolls.[2] By express statute turnpike-tolls are deemed not to issue out of a turnpike road or tollgate, and so are not ratable, though the trustees are owners of the soil of the highway.[3]

A lighthouse stands in a peculiar position distinguishable from canals and ferries where tolls are levied. Where a lighthouse is within a parish, and tolls are leviable, the tolls are not deemed as income or profit arising out of the house, so as to be counted as ratable value, though the house is ratable *per se*. In one case a lighthouse worth four pounds a year was sought to be rated at 2,250*l*., but the court held the large sum must be struck out of the rate.[4] And the reason given was, that the attraction of the tolls was due to burning oil in the premises and not to anything connected with the use of real property in the parish. And for a like reason, market tolls which have nothing to do with the occupation of the soil, and have no corporeal quality, are not ratable, though it is different where the soil is used as a market and tolls received for such use, as in that case they are profits of the land.[5]

Place of rating corporeal property.—As ratable subjects are of a corporeal and visible quality, the rule is, that they are ratable in the parish where they are situated, and it is immaterial that property extending to different parishes is held under one lease or tenure, for the value of each part must be taken in its own respective parish. The same rule applies to bridges,[6] docks, canals, waterworks, gasworks,

[1] R. *v* London, 4 T. R. 21. [2] R. *v* North Shields, 1 E. & B. 140; Williams *v* Jones, 12 East, 346. [3] 3 Geo. IV. c. 126, § 51; R. *v* Great Dover, 5 A. & E. 692. [4] R. *v* Coke, 5 B. & C. 797. [5] Caswell *v* Wolverhampton, L. R., 7 Q. B. 334. [6] R. *v* Hammersmith, 15 Q. B. 369.

and mines, though for convenience the place of collecting tolls may be in one parish only.

Summary of poor laws.—Such being an outline of the law relating to the relief of the poor, it may well excite astonishment how all those details and all that intricate machinery, such a staff of officers, paid and unpaid, should be necessary in order to find out the best, or rather the least objectionable, mode of satisfying the hunger of any one destitute and starving person; for this and this alone is the origin and end of the whole mass of positive enactments which have accumulated during nearly three centuries since the cardinal principle was first adopted (and it took nearly a century to discover that one starting point), namely, the principle of rating the inhabitants of each parish in equal proportions, according to the extent of their property, to support the paupers living within its bounds. In order that an answer may be given to the simple question, what is the most equitable and humane method of relieving a pauper, the legislature soon saw that this was a large and suggestive inquiry, touching on a vast variety of particulars, and hence it was, that it entered on a survey since proved to be so extensive. Instead of giving any direct right to a pauper to claim relief at the hands of any one fellow parishioner, the legislature has created a vast organisation of complicated machinery, in order to arrive at the same conclusion, but in the least objectionable way. It first created a set of compulsory and gratuitous officers, called overseers, whose duty it was to collect a rate, first by moral suasion, then by compulsion of the law, from all the occupiers of property in the parish; and how to make that rate fair and adequate and secure from misapplication required immense thought and care, applied to varied circumstances. It next superadded a second set of gratuitous, though not compulsory, officers, called guardians, to supersede and control the overseers to a large extent. It called into being workhouses on a large scale, in which to feed, clothe, and treat with becoming humanity those poor who required relief, and a large staff of paid officers to attend to the details of finding out the genuine poor, and separating the impostors from the helpless and deserving. To check these paid and unpaid officers, through whose hands vast sums of money necessarily required to

pass, it next created a large central board of paid officers, whose sole business it was to see that the others did their duty; and to give greater importance to this part of the machinery, it made the superior central officer a member of the government, having a voice and influence in parliament, and thereby attracting towards the central board itself the vigilant eye of parliament, with its hundred eyes and ears. At each and every turn in the complicated arrangements, difficult and nice questions of law, justice, humanity, and fair play required to be settled, to be tried and altered, tried and settled again and again, till a reasonable efficiency was attained. And the result of all this elaborate mechanism has been, that whenever a starving pauper is discovered, there are officers at hand ready at a moment's notice to inquire and take instant action in his behalf, their fidelity and zeal being guaranteed by the terrors of indictment or penalties on the one hand, and by the incessant vigilance of the central board and its officers, with argus eyes watching them on the other hand. By this means each officer is kept at his post, and the watchers themselves in turn kept to their duty by an open press and a free parliament, ever ready to denounce the slightest deviation from humanity or tendency to oppression.

The apathy and cruelty which steal over those dealing with an endless procession of misery and imposture, and to which all paid officers are prone, have sometimes been attempted to be kept in check by missionaries and visitors imbued with Christian charity, having a regulated right of access to paupers; but even charity itself tends to grow cool, and this apostolical succession is difficult to be maintained. The Knights of Malta began with noble zeal to devote themselves to attending the sick, and were eager to serve them with vessels of silver, and wait on their call. But Howard found that in course of time they had long abandoned personal ministrations, and devolved their noble duties on menials.[1] By the now existing machinery, which, however cumbrous, acts with certainty, and can be brought to bear on each individual case as it arises, it can seldom happen except by some criminal delinquency or scarcely less criminal apathy of the officials, that any one individual member of the community, however obscure, can be

[1] Dixon's Howard, 303.

left to die of starvation, whatever be his misfortunes or whatever his demerits, except indeed it be, that some false shame on the part of the necessitous, or some accident, for which none can be blamable, prevents their case being known and so brought within the reach of the machinery provided. And the whole is a result which reflects the highest glory on the legislature of any country—that it has provided a means which enables every human being to be supplied with at least sufficient support for life, though it is to be given in such a way as neither to injure the recipient nor those who are the involuntary donors. The cumbrous and far-fetched method of doing this may admit of many improvements in detail; but it must always appear a monument of human wisdom, for which we are indebted, not to the Greeks or the Romans, nor even to our common law, but to that fortunate system of government which allows the hardships and wants of every class to reach the ears of those who are not too far removed in sympathy and self-interest, and who are both able and willing to alleviate them.

Codification of poor laws required.—But though the English poor laws form a noble monument of modern civilisation, one dark blot has always been conspicuous on the face of them. They are the efforts of many minds, many generations and legislatures, produced piecemeal, in haste, and at uncertain times, without order or method; the enactments and decisions are thrown about here and there without sequence or connection, and enunciated in such language that it is utterly impossible for those whom alone they are directly intended to benefit and protect, to be able to attain any reasonable knowledge of them. It might be asked whether it has ever dawned on the legislature that the poor laws are after all only a means to an end, that they were not created in order to find employment to an army of officials, in which case the more complicated and confused they were, the more numerous would be those required to help each other to explain them. These laws were created solely to prevent the poorest of the poor from starving, and to prevent this in the most humane way to themselves and the most just way to others: and one of the most humane and considerate ways of treating the poor, as it is to treat every

one besides, is to give them the means of knowing with some reasonable certainty what they are to expect at the hands of their neighbours—how they are to act—what they can do themselves—and what no one else can do for them—what they have to hope for, and what they can at the utmost and under the most favourable circumstances ever attain to. All the poor and all the classes bordering on poverty have no means provided to them of acquiring, and no pains is taken on their behalf of imparting to them, this useful knowledge; and they are wholly indebted for all they do know of what so intimately concerns them to the generosity of others, and to that searching light which pervades all ranks of society in an age of a free press, and of universal education, and of manysided philanthropy. Caligula himself, when unable to answer those who complained of his laws being unknown, confessed and avoided his duty by having them written in a small hand and set up on a high place at the side of the street, so that none could copy them.

The apathy of the public—including those who are, as well as those who are not, attracted by close personal interest—as to matters of poor law reform, has for generations been conspicuous, and has vastly retarded all improvements. In 1735 the House of Commons passed a resolution, that for the better understanding of the laws relating to the poor, it was very expedient that they be reduced to one act of parliament.[1] It is said that Pitt, in 1772, tried in vain to bring in a poor law reform.[2] And in the present day the law is involved in a crude and unwieldy mass of undigested material, which it requires the greatest time and skill for a select few to comprehend and apply; and it is left in such state, as if it was not, and never could be, any other human being's interest or desire to know the details.

[1] 13 Parl. Hist. 965. [2] 1 Butler's Rem. 60.

CHAPTER VII.

TEMPORARY ARREST AND IMPRISONMENT BEFORE FINAL JUDGMENT OR SENTENCE.

Distinction between arrest and punishment.—The preceding chapters have dealt with the restrictions which the law imposes on all the rest of the community, for the purpose of preserving the body of each individual from every kind of wrong and evil, for which the law can give redress; and one chapter was confined to those compulsory duties, which are also in the nature of restrictions, and the object of which was to promote in some way the common good of all. We come now to consider the other side of the picture, and to state what those restrictions at the most amount to, which are put on third parties for the protection of each and all alike—what is the worst that can be done to the bodies of third parties, who perpetrate the wrongs already noticed, as well as all other wrongs that can be done between man and man. While law, with impartial hand, protects the good and the bad, it chiefly protects the good by punishing in some way the bad just enough, and no more than enough. The wrongdoer is subjected to pain, and even to death, but the variety of ways in which this is done, by graduating the punishment in each instance to the nature of the offence, required great detail, immense thought, and the finest distinctions. How far this punishment is to go, is a complicated question, for it would never do to kill every one for the slightest offence, or for the smallest cause of action. Punishment must itself be restrained, and the impulse of revenge, and the desire to retaliate require most of all to be controlled by the law; otherwise we should merely be a community of wild

beasts, devouring and making an end of each other, till one only should be left.

The radical idea in this part of the subject is, that punishment, whatever form it may take, cannot be administered in a moment. Some time must elapse between the offence or wrong, and the pain or suffering that is to follow upon it. Justice cannot be done off-hand, or at one sitting, no matter who is the judge. The judge with his executioners is not always ready to strike. There must be a pause either to capture the wrongdoer, or to examine into the facts relating to his misdeeds. It is only the most barbarous of tyrants, who pride themselves on the swiftness with which their decrees are executed, and with which the victim is finished. All tribes and nations, having the least tincture of civilisation, accustomed to the smallest reflection, must confess, that punishment by any human tribunal is not attainable by the flash of an eye or the intuition of a moment. There is thus a marked distinction between the final sentence and the transition state preceding it, during which, the crime or wrong having been done, the preparation is made for the conclusion and the appropriate punishment. The last stage is properly speaking the punishment, the preceding stage is the period of arrest and trial. The period of arrest may be in itself a mode of punishment, but the humanity of all ages seems to have dictated some sort of trial, or the semblance of trial—some inquiry and consideration, so as to be sure that the misdeed was done—that it has been found out—that everybody is satisfied it has been discovered—that the right punishment shall be applied, and that the right judge shall apportion and apply it. Even in the clearest cases anything short of some formal trial is abhorrent to civilisation. It was said, indeed, that at one time a thief taken in the fact, could by the common law be brought into court then and there, and tried without any indictment, though this short and summary process was stopped so far back as the reign of Edward III.[1] In all cases, no matter how clear and strong and irresistible may be the evidence of guilt, it is much more satisfactory that a formal trial should take place, when the miscreant may give his explanation, and have some time even to think over the best excuse he can

[1] 2 Hale, 149.

render. These two stages, therefore, of arrest and trial as the first, and the punishment as the second, will be investigated in their order; and the present chapter is confined to all that pertains to arrest and trial, so far as these affect the body.

Surveillance for crime, in what cases.—Though the fundamental rule is, that no person, who is not already arrested and in the custody of the law for debt or crime, can be subjected to control or supervision of any kind at the hands of another, so as to interfere with his liberty of action, with his right to earn his living or to pursue his occupations in whatever way he thinks fit, there is a slight modification of this rule, where the person has formerly been convicted of crime and the punishment is at an end. When the penalty or fine has been paid, when the imprisonment has been endured, the criminal is quits with society, and is once more as free as his neighbours. He can only again be brought within the custody of the law in the same manner as if he had never violated that law at all. But, owing partly to the recent practice of allowing convicted persons to leave prison earlier than their sentence permitted, subject to certain conditions as to good conduct, and partly owing to the common knowledge, that crime is almost a profession, and that those, who have once given way to it, show a proclivity to the same or like courses on future occasions, a state of probation and surveillance has been introduced in modern times, during which the person is free, but subject to conditions. These conditions vary with the fact, whether he has previously committed two crimes of certain definite classes, or whether he holds a ticket of leave or licence under the penal servitude acts.

How far a person convicted of crime is under surveillance of police.—When a person has been twice convicted of any felony, or of coining, or of false pretences, conspiracy to defraud, or an attempt at burglary, he becomes at the end of the second sentence subject to certain peculiar disabilities for the subsequent seven years of his life. If he is charged by a constable with getting his livelihood by dishonest means; if on being again charged with an indictable offence, he refuses to give his name or address, or gives a false name or address; if he is found under such

circumstances as to warrant the suspicion that he was aiding in or waiting for the commission of any offence; if he is found in any premises without being able to give a satisfactory account of being so found—in each of these cases, except the second, he may be arrested at once by a constable; and in the last case also by the owner or occupier of the premises and his servants, and on conviction may be imprisoned for a year.[1]

The state of things now mentioned follows as a matter of course, after every second conviction for the crimes specified. Moreover, on such second conviction the court may, in addition to the sentence for the second offence, direct that the criminal shall be subject to the supervision of the police for seven years after the expiration of his second sentence, and this, whether he ever after commit any further offence or not. During those seven years, he must notify the place of his residence to the chief officer of police of his district, and whenever he changes his residence, he must again notify each change to the police of both districts, if there are two districts. Moreover, if the criminal is a male, he must once a month report himself in person to the chief officer of police. To fail for forty-eight hours so to report the residence or change of residence, is of itself an offence punishable by one year's imprisonment.[2]

Such is the extent of supervision to which a twice convicted criminal subjects himself, in cases of nearly all the more serious crimes. But there is also a certain supervision of all persons, who, having been once convicted, have been allowed to escape part of the punishment on a licence or ticket of leave. These persons, being licence-holders, are also bound to notify their residence to the police of the district, and to notify each change, subject to the risk of imprisonment of one year for neglecting to do so.[3] If such person is getting his livelihood by dishonest means, he may at any moment be arrested by a constable, and if justices of the peace are satisfied that the constable's grounds of suspicion are well founded, he forfeits his licence, and must return to the original custody.

Arrest or imprisonment by command of the sovereign.—One of the first thoughts that will occur to everyone, when

[1] 34 & 35 Vic. c. 112, § 7. [2] Ibid. § 8. [3] Ibid. § 5.

a government is constituted, a law defined, and society settled, is, whether the head of the government is so far exempt from the ordinary rules of procedure, that he can at will imprison or punish any one of his subjects, with or without reason given, and whether any one can question the act. This is a point of supreme importance in all communities and all stages of civilisation, for if a law exists worthy of the name, such law must imply the very negation of all arbitrary power whatever being lodged in any one member of the commonwealth, so as to authorise him to depart from the settled order of procedure it has set down. It can scarcely be a law at all, if it has not expressly laid down some definite rule, and has not also minutely defined the reasons for which, and for which alone, the liberty of any one individual can be interfered with.

When Magna Charta (c. 29) declared that no freeman was to be arrested or imprisoned, except by the lawful judgment of his peers or by the law of the land, this was early interpreted to mean either a presentment or indictment, the two legal processes then available.[1] That statute thus wisely foresaw the great difficulty, and laid down a cardinal rule, which may be said, indeed, to be the very basis of all law as well as all liberty; for when once a procedure is invented for getting rid of every conceivable wrong and difficulty, or at least the most urgent of these, that procedure must be adhered to, and no other can be tolerated.[2] But in the time of Charles I., the case arose where Sir Thomas Darnel, having refused to pay a forced loan, which he said was illegal, was kept in prison by a warrant which set forth nothing more than that the king specially ordered him to be imprisoned, without stating what that reason was. And the question raised in his case was, whether that was a sufficient reason for the commitment. It was argued on the part of the king, that it

[1] 5 Ed. III. c. 9; 25 Ed. III. c. 4; 28 Ed. III. c. 3; Rot. Parl., 26 Ed. III. p. 9: Ibid., 36 Ed. III. p. 22; 2 Rot. Parl., 42 Ed. III. p. 12.

[2] It was deemed sound law by the ancient Persians, that the king could slay any one he pleased, or order him to instant execution without trial.—*Herod.* b iii. c. 35; b. iv. c. 84; b. vii. c. 90. But Sir John Markham told Edward IV. that an English sovereign could not arrest a man, either for treason or felony, as a subject might, because if the king did wrong, the party could not have his action against him.—1 Hen. VII. fol. 4; 5 Parl. Hist. App. 208.

must and ought to be presumed, that there was a good reason extant, and that it was improper to question it; and as the king was the fountain of justice, this necessarily implied that he must have a power over and beyond any that the courts of law can have, seeing that he must have given to them only part of the whole, that was inherent in his person. The court of that time, indeed, held that the king's commandment was a good cause of commitment, in other words, that the king could legally do what he did. The chief justice of the court (Hyde, C. J.) said he had found a resolution of all the judges, in the reign of Queen Elizabeth, that, if a man be committed by the commandment of the king, he is not to be delivered by a *habeas corpus* in this court, "for we know not the cause of the commitment." The judge, therefore, felt bound by precedent, and thus concluded: "What can we do, but walk in the steps of our forefathers? Mr. Attorney hath told you, the king has done it for cause sufficient, and we trust him in great matters. He is bound by law, and he bids us proceed by law; we are sworn so to do, and so is the king. We make no doubt the king, he knowing the cause why you are imprisoned, will have mercy. On these grounds we cannot deliver you, but you must be remanded." It is not to be wondered, after a decision like this, which the court professed to found, not on principle, but solely on precedent, and which it required an indignant meeting of the Houses of Parliament to upset and reverse in another way, that all the prejudices of the people against the practice of courts so blindly following precedents, should be firmly rooted from that day to this.[1]

This decision of the courts, however, so disgusted the parliament, that both houses took the matter into their own hands. A conference having taken place between them, the result was, that they embodied this in their Petition of Right as an instance of bad law. They ear-marked it and labelled it as detestable and baseless; and from the date of the king's assent to that petition, it has been clearly established, that no Englishman can be lawfully imprisoned by the mere order or special command of the king; but he can only be accused and charged, if at all, in the ordinary way, with some specific crime known to

[1] As to the binding effect of precedent, see *ante* vol. I, p. 148.

the law, and for which a trial can be had and a decision given.[1] Notwithstanding, however, that solemn settlement of this vital point of law, Selden and others were in the following year, 1627, committed on a somewhat similar warrant, though the proceeding was not argued out a second time, owing to their release. Again, one Jenckes having been committed in 1676 by the special commandment of the Privy Council, and having met with great delay in procuring his liberty by *habeas corpus*, the *Habeas Corpus Act* passed in 1679, which gave a more prompt and certain remedy against all such arbitrary imprisonments in future, at the command of the crown or of any great power in the state, other than the ordinary courts. And though the conduct of the judges in Darnel's case, and what followed upon it, led the king into false courses, the right result was in the end arrived at, namely, to put an end to the delusion, that any man's liberty is at the mercy of the crown. And since then it has never been for a moment disputed, that no individual can be imprisoned by the command of the crown; but that, if any one is imprisoned, it must be by or under some judgment of a court or judge, or under other authority given by act of parliament, expressly or impliedly, or under some definite charge specifying the offence.[2] Moreover, when the Star Chamber was abolished, in order to make doubly sure of this cardinal rule of the liberty of the subject, it was solemnly enacted in 1641, that "if any person should thereafter be committed, restrained of his liberty, or suffer imprisonment by the command or warrant of the king's majesty, his heirs, or successors, in their own person, every such person, upon demand or motion made by his counsel to the judges of the Court of King's Bench or Common Pleas in open court, shall without delay have a writ of *habeas corpus*, and the court shall proceed to examine and determine, whether the cause of such commitment appearing upon the return be just and legal or not, and shall thereupon do what to justice shall appertain, either by delivering, bailing, or remanding the prisoner."[3]

Arrest under general warrants of privy councillors.—But

[1] Darnel's Case, 3 St. Tr. 1. [2] 1 Campbell's Ch. J. 384; 2 Inst. 186. [3] 16 Ch. I. c. 10, § 8. As to *habeas corpus*, see further *post*, at the end of this chapter.

though the subject is secure against arbitrary imprisonment at the order of the crown, the next thing to be assured of is that no minister of state or privy councillor, who is scarcely less formidable in power—whose power is so extensive, as Lord Camden remarked, that it spreads throughout the whole realm—can do the same thing under a slightly different form. It seems that no subject of the crown, however high in authority, has ever attempted to carry his power with so high a hand as to order a man to be imprisoned on his mere authority, and without specifying any crime or charge as his reason for doing so. The utmost that such high officials have attempted has, however, been very much the same thing, namely, to issue a general warrant authorising some person to be searched for and found and imprisoned, as being the author of a seditious libel. The fact that the unknown person is not searched for without a kind of specific charge being hinted at makes this mode of imprisonment less odious than if no reason at all were assigned. But as the crime of libel has always been so intimately associated with the liberty of the subject, with that liberty to think, and speak, and write whatever one is inclined to, and which is always itself a large and valuable part of the liberty of the subject, it is not to be wondered that the attempt to imprison a person under a general warrant should have excited almost as much indignation as if the cause or ground of arrest had been wholly left out, and as if it had been a warrant to seize anybody and everybody at the caprice of the minister for any purpose that lay in that minister's secret thoughts.

This dangerous power of ministers of state was clearly appreciated when the Star Chamber was abolished. The power of any privy councillor or of the whole Privy Council to arrest or commit any individual, unless for a definite crime, was declared illegal by that very statute in 1641; and, as in the case of commitment by command of the king, the person restrained of his liberty by any such authority as a privy councillor's, was stated to be entitled to his *habeas corpus*, so that the judge or court might determine whether the commitment was just and legal, and if not, he was to be delivered at once.[1]

[1] 16 Ch. I. c. 10, § 8.

Power of secretary of state to issue general warrant.— When Lord Halifax, the Secretary of State in 1763, was anxious to discover the author of a seditious libel in the *North Briton*, No. 45, he issued a general warrant to his messengers to search for the offender. No individual being named in the warrant, forty nine persons were arrested, and among others Dryden Leach, printer, was taken from his bed at night, his papers seized, and his journeymen and servants also apprehended. Wilkes, having also afterwards been arrested on the same ground, observing that his name was not mentioned in the warrant, said it was "a ridiculous warrant against the whole English nation," and refused to obey it. He was accordingly arrested and committed to the Tower, while his papers were ransacked. The printers and Wilkes then brought actions for damages. Leach obtained 400*l.* damages against the messengers. Wilkes recovered 1,000*l.* against Wood, the Under-Secretary, and 4,000*l.* against Lord Halifax.[1] The defence of the Secretary of State turned in that case partly on the meaning of a precedent of the time of Elizabeth, where the judges were said to have resolved, that a privy councillor, as such, could only commit for high treason, and that the cause of commitment, whether by one councillor or the whole body of the Privy Council, must be shown in all cases. This resolution, which, Lord Camden said, had a studied obscurity in it, was the leading *dictum* from which to argue.[2] And it was mainly argued that a secretary of state must have such right, because he was a conservator of the peace; but Lord Camden said a secretary of state was not by the common law a conservator of the peace at all, or, as the Attorney-General of the day called him, "a sentinel for the public peace;" nor was he entitled to exercise larger powers of committing third parties than any person who was not such secretary. He was, in the origin of the office, only the keeper of the king's privy seal, and he used to affix it to grants, and to make up despatches at the conclusion of councils. He grew into importance after the Restoration; but his duties, being ministerial, did not import that he had any authority whatever as a magistrate.[3] A secretary of state thus did

[1] Leach v Money, 19 St. Tr. 1001. [2] 1 Anders. 297. [3] Entick v Carrington, 19 St. Tr. 1030.

not, it was held, come within the letter or the spirit of the acts of 7 James I. and 24 George II., which were passed to protect justices of the peace against vexatious actions.[1] Lord Mansfield summed up the point of law then discussed in this way:—"As to the validity of this warrant, upon the single objection of the uncertainty of the person, being neither named nor described, the common law in many cases gives authority to arrest without warrant, more especially where taken in the very act. And there are many cases where particular acts of parliament have given authority to apprehend under general warrants, as in case of writs of assistance or warrants to take up loose, idle, and disorderly people. But here it is not contended, that the common law gave the officer authority to apprehend, nor that there is any act of parliament which warrants this case. Therefore it must stand upon principles of common law. It is not fit that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge, and should give certain directions to the officer. This is so upon reason and convenience. Then as to the authorities, Hale and all others hold such an uncertain warrant void, and there is no case or book to the contrary. It is said that the usage has been so; and that many such warrants have been issued since the Revolution down to this time. But a usage, to grow into law, ought to be a general usage *communiter usitata et approbata*, and which after a long continuance it would be mischievous to overturn. This is only the usage of a particular office—the secretary of state's, and contrary to the usage of all other justices and conservators of the peace."[2]

Since that time it has never been doubted, that no person can be legally arrested except under a warrant signed by justices or other legal authority, expressly naming the person arrested; though if the name were entirely unknown and unascertainable, then no name need be specified, if the next best means of identification be given.

General warrant to search for libellous papers.—The controversy was not ended when it was settled, that a person could not be arrested under a general warrant, for it was

[1] Entick v Carrington, 19 St. Tr. 1030. [2] Leach v Money, 19 St. Tr. 1001.

still thought that at least his papers might be searched for. The Star Chamber assumed a jurisdiction to search for libels against church or state; and any books found were to be seized and carried before the proper magistrate. The same tribunal usurped a general superintendence over the press, and exercised a legislative power in all matters relating to the subject. It appointed licensers, prohibited books, inflicted penalties, and dignified one of its officers with the name of the Messenger of the Press.[1] After that court, however, was abolished, the press became free, but enjoyed its liberty not above two or three years, for the Long Parliament thought fit to restrain it again by ordinance, and revived the Star Chamber practice. And it was against this ordinance that Milton wrote his famous pamphlet *Areopagitica*. Upon the Restoration the press was once more free, till the 13 & 14 Charles II. c. 33, the Licensing Act, was passed, which, for the first time, gave the secretary of state a power to issue search warrants, but these warrants were only incidental to the inquiry into the licence. That act expired in 32 Charles II., or thereabouts. It was revived again in the first year of James II., and remained in force till the fifth of King William, after one of his parliaments had continued it for a year beyond its expiration. When the Licensing Act expired at the close of Charles II.'s reign, the twelve judges were assembled at the king's command to discover whether the press might not be as effectually restrained by the common law as it had been by that statute. The judges resolved, 1st, That it was criminal at common law not only to write public seditious papers and false news, but likewise to publish any news without a licence from the king, though it was true and innocent; 2nd, That libels are seizable.[2] But the opinion of twelve judges extrajudicially, as Lord Camden remarked, did not make that law, for which there was no authority.[3] And it was finally decided conclusively, that there is no authority in the common law for the practice once attempted of a secretary of state issuing a general search warrant, *i.e.* a warrant not naming any person as accused, and under it to seize the supposed author of a seditious libel; nor is there any like authority to enter his house and

[1] Per Pratt, C. J., Entick *v* Carrington, 19 St. Tr. 1030. [2] 7 St. Tr. 929. [3] Per Pratt, C. J., Entick *v* Carrington, 19 St. Tr. 1030.

seize his papers for purposes of such search so as to discover the real criminal.[1] And for like reasons the House of Commons also resolved, in 1776, that a general warrant for apprehending the author, printer, or publisher of a libel, being illegal, except in cases provided for by act of parliament, is, if executed on the person of a member of the House, a breach of privilege; and the seizing or taking away the papers of the author, printer, or publisher of a libel is also illegal, and such seizing or taking away the papers of a member of the House is a breach of privilege.[2] The liberty of the subject in this respect was thus declared to be unassailable either by the crown or any minister of state.

All grounds of arrest are either civil or criminal.—As neither the crown nor any high officer of state can arrest or imprison an individual arbitrarily (except in case of treason, as to which certain powers are recognized, which may be passed over for the present), it may be stated, that no individual can be imprisoned at all by any other member of the commonwealth except under process of some court, and as a preliminary to some sentence or judgment of a court, and as to some matter which courts can lawfully entertain and dispose of. All such matters naturally divide themselves mainly into two, namely, complaints or charges for debt or damages on the one hand, and charges of crime or criminal offences on the other. Civil matters and criminal matters, according to the various ways of dealing with them, form nearly the entire business of courts of justice, and it is necessary to consider what are the civil matters which a court can lay hold of for the purpose of arresting or imprisoning the body of any one member of the community. And it may be treated as a safe rule for practical guidance that, when any person's liberty is taken away or interfered with, he may conclude that unless the reason or ground of interference is something connected with a pending or impending suit or charge against him in a court of law, including the High Court of Parliament, those who so interfere with him must be in

1 Entick v Carrington, 19 St. Tr. 1030; Wilkes v Wood, 19 St. Tr. 1153; Leach v Money, 19 St. Tr. 1001. 2 15 Parl. Hist. 1393; Co. G, 207.

the wrong, and must justify themselves when he calls them to account.

Firstly, then, those cases in which one's personal liberty can be controlled by reason of some claim of debt, or contract, or damages against him of a civil nature, during the period antecedent to final judgment, may be treated of.

Early practice of civil courts as to arrest on mesne civil process.—The procedure in all courts, even of civil jurisdiction, until very recent times, abounded in details, showing in what small account personal liberty was held, compared with the interests of those who sought rightly or wrongly to enforce their claims. One might naturally expect that all that would be necessary was for one party, through the intervention of the court, to issue some notice to his adversary of what the claim was, and to convene that adversary at a given time before a judge, so that, after both sides were heard, there might be a decision as to which was right; and until that final decision, that matters should remain *in statu quo*, or at least, that no further alteration should be made than merely to prevent the defendant making away with his property, so as to defeat and anticipate an adverse sentence. But that calm neutrality was by no means in keeping with the early views and notions of litigants or courts. On the contrary, when a litigant began his suit, it was at once assumed as a matter of course that his adversary would run away either to some foreign country or hide and conceal himself and his property, so that justice might be baulked. And hence if the adversary did not obey the first notice and come into court, and even in some cases before he had notice to do so at all, he was arrested and put in prison, and not released till he gave bail or sureties to abide the ultimate future adjudication. The petty fictions and pretexts under which the liberty of defendants was frittered away in such cases are monuments of human folly, and the inventions and disguises on which they proceeded are no longer worthy to be remembered. In the time of Blackstone these were in full vigour, and are mentioned with much more deference and gravity than they have in modern days received. The facility, and recklessness, and oppression with which everybody could be thrown into prison at the suit of anybody, often on

false and untenable grounds of complaint, and without any means of sifting or giving colourable ground for them, are scarcely credible in modern times.

This practice of arresting debtors and holding them to bail existed from the time of Henry III.[1] If the bail in case of debt did not attend at the day fixed, he was liable in a sum fixed by the judges.[2] But when the debtor was rendered, the bail was entitled to be released.[3] In the reign of George I. these arrests on mesne process could not take place for sums less than ten pounds.[4] But in inferior jurisdictions arrest could take place for less sums until a much later period.[5] This limit of ten pounds was afterwards raised to fifteen pounds, and in 1827 to twenty pounds. And at the latter date it was found that no fewer than 3,662 persons were lying in prison in England under such commitments.[6] It was not to be wondered that in 1837 such arrests on mesne process should be finally abolished, and that the legislature should declare the whole practice to have been unnecessarily extensive and severe.[7]

Arrest of defendants about to leave the country.—But though it is no longer competent to arrest and imprison any person during the stage of a litigation until final judgment or decree is obtained, there was one exception, namely, where the defendant was likely to leave the country, and go out of the jurisdiction; for, if he were to do so, in order to defeat any judgment of the court, this was deemed equivalent to rendering nugatory the whole proceeding. In this case therefore the Common Law divisions and also the Chancery division of the High court still reserve power to interfere so far with the liberty of an absconding defendant, as to stop and imprison him till he has at least given security to answer the judgment of the court. This reserved power is thus a qualification of the general rule, that citizens may go abroad at any time without any leave of the crown. Indeed Magna Charta recognised the right of every person to go out of the kingdom at will except in time of war, and banishment was unlawful except by

[1] L. Ellenborough, 27 Parl. Deb. 739. [2] 7 Rich. II. c. 17. [3] Lib. Alb. b. iii. p. 1. [4] 12 Geo. I. c. 29. [5] 19 Geo. III. c. 70. [6] 17 Hans. Deb. (2nd) 386. [7] 1 & 2 Vic. c. 110.

sentence of a court.[1] Yet some qualifications seem to have been introduced by statutes, and Lord Coke recognises them, as will be noticed in a subsequent page.

In what cases arrest of debtor before judgment allowed.—As the law is now settled on this subject, when any action or suit is begun in courts of justice, the proceedings must go on to their natural termination without any interference with the defendant's person. But the exception to the rule is, that where the defendant in an action in the High Court is about to quit England, either after the writ has issued, or any time before final judgment, he may be stopped in a certain specified way.[2] Yet before a defendant even in such circumstances can be arrested, it must be proved on oath to a judge of the High Court, that the plaintiff has good cause of action to the amount of fifty pounds and upwards, that there is probable cause for believing that the defendant is about to quit England unless he is apprehended, and that his absence will materially prejudice the plaintiff in the prosecution of his action. This latter particular, indeed, need not be shown in all cases. And any such imprisonment of a defendant cannot in any case last beyond six months; and the alleged debtor may always be discharged on giving security that he will not go out of England without the leave of the court, or on depositing in court the sum demanded.[3] This order to arrest a debtor going abroad is made *ex parte* on affidavit; but the debtor may apply to the court to rescind or vary the order for satisfactory cause.[4]

Arrest of defendants in equitable suits going abroad.—Such is the rule in the Common Law Divisions of the High Court, and for centuries the Chancery Division did much the same thing by means of the writ of *ne exeat regno,* which was equally necessary for the purpose of preventing the jurisdiction being evaded and the suit being rendered abortive.

When the writ ne exeat regno *issues against defendants.*—This writ of *ne exeat regno,* which was issued in certain circumstances to prevent a person who was within England from leaving the realm, was a species of equitable bail, as Lord Eldon called it, and is treated in much the same way

[1] Mag. Chart. cc. 39, 42. [2] 32 & 33 Vic. c. 62, § 6. [3] Ibid., Rules of Court, Ibid. [4] Ibid.

as applications for bail.[1] The early history of this writ, when the Court of Chancery was a separate court, seems to represent it as chiefly a political instrument used to stop the departure of persons, who attempted things prejudicial to the king and state. But Lord Bacon in his Ordinances alluded also to its having been before his time long in use in case of defaulting bankrupts and debtors as well as duellers.[2] No statute can be traced, which authorised the application of the older writ to private suits, and Lord Eldon could justify it on no other ground than the usage referred to by Lord Bacon.[3] Coke said that in the time of Edward I. certain orders of men were deemed to be under a continual prohibition of quitting the realm—as peers, because they were councillors of the crown; as knights, because they were to defend the kingdom from invasions; as ecclesiastics, because they were attached to the see of Rome; as archers and artificers, lest they should instruct foreigners to rival the manufactures of England.[4] In 1381 a statute passed prohibiting all persons whatever to go abroad without licence, excepting only lords and other great men of the realm, notable merchants, and the king's soldiers, and this statute was not repealed till 1607.[5] Licences to travel used to be granted under the great seal, the privy seal or privy signet, and Judge Jenkins in 1675 seemed to think the king had an inherent right to stop any subject leaving his dominions with or without cause.[6] The practice however which has now become settled on this subject is, that the writ will not be obtained as a matter of course by one subject against another; but that not only cause must be shown for supposing that the party is going abroad, but a suit must be actually commenced, and must show that the defendant is indebted to the plaintiff, and it is not enough to allege that injustice will be done.[7] The plaintiff who applies for this process must not himself be living abroad; for, if so, he could not properly settle the account with his adversary any more than his adversary if living abroad could with him. Moreover the applicant must make an affidavit, not only

[1] Haffey *v* Haffey, 14 Ves. 261. [2] Bac. Ord. No. 89. [3] Jackson *v* Petrie, 10 Ves. 166. [4] 3 Inst. 84. [5] 5 Rich. II. c. 2 4 Jas. I. c. 1. [6] 2 Jenk. Lett. 712; 10 St. Tr. 406, 418, 450. [7] 3 P. Wms. 312; 5 Ves. 592.

that there is some ground of debt, but state a debt with reasonable certainty as actually due at the time, unless there has been a report or admission equivalent to such affidavit.[1] For whatever the claim be, it must resolve itself into one of a pecuniary character.[2] And if the affidavits in support of the application be reasonably specific, the court will not listen to the defendant, who may be ready to deny these, except in very peculiar circumstances.[3] When the writ issues, the sheriff executes it by imprisoning the defendant, who, in order to his release must execute a bond with satisfactory sureties.[4]

Arrest of defendant in civil cases must be by officer of sheriff.—In all those cases where a defendant may lawfully be arrested on civil process, he is arrested not by the plaintiff, but by the officer of the sheriff. To allow one complainant to seize his adversary is at all times a dangerous practice, and would supply too easily a ground for provocation such as few adversaries could resist. But when the liberty of parties is interfered with only by known ministers of the law, who are divested of all partisanship, and act only because the court must, as a matter of business, resort to some means of arrest, the resentment of the litigant is disarmed, and he ceases to indulge in that violence, which might naturally break out at the sight and touch of an adversary. Hence the law prudently begins a litigation without departing from that calm neutrality, which in the end satisfies both the victor and the vanquished. It was so also in ancient Rome, where at one time a plaintiff could seize his adversary and bring him before the prætor, but at a later stage Constantine made it necessary to summon him by writ.

How far one may be arrested for mere suspicion of crime.—It is a cardinal rule, which ought to be written in letters of gold, that no one can be arrested on mere suspicion of crime. This rule that such suspicion is no ground for arresting any man is well settled,[5] and it applies to misdemeanours and all crimes whatsoever.[6] There is no such thing

[1] Hyde v. Whitfield, 19 Ves. 342; Whitehouse v Partridge, 3 Swanst. 365; Thomson v Smith, 34 L. J., Ch. 412. [2] Blaydes v Calvert, 2 J. & W. 211. [3] Jones v Alphesin, 16 Ves. 471. [4] Boehm v Wood, T. & R. 332. [5] Coxe v Wirrall, Cro. Jac. 193. [6] Bowditch v Balchin, 5 Exch. 380.

allowed as seizing and detaining any one, till evidence shall have been found on which he may be charged or convicted.[1] In the time of Edward I. indeed suspicion was a good ground of arrest, and the night watch could detain a stranger till the morning.[2] And great laxity of practice on this subject pervaded the precedents of the court till the time of Elizabeth. It is now, however, established, that though a constable may arrest for crime without seeing it committed, yet he must act only on the report of a credible witness. In the night time indeed a somewhat greater latitude is allowed, as will be afterwards noticed: nevertheless the general rule is, that arrest for mere suspicion of crime is unknown to the law of England.

Arresting and searching suspected persons.—While the general rule is, that no person can be arrested on mere suspicion, some of the qualifications go far towards making exceptions. When it is lawful, as will be afterwards stated, to arrest persons found committing a variety of offences, whether felonies or misdemeanours, or those of less degree, such arrest must be founded on some visible act patent to the senses, and leaving little doubt as to the fact of the offence being at the time in course of being committed. It is another thing to arrest and imprison a person who is not found commiting an offence, but who is only suspected of having committed one; and above all it is contrary to all law to arrest a person in order to search him, and thereby discover on his person the evidences of some crime or some offence for which otherwise he may be punishable. To seize and search a man is not only in the highest degree contrary to any settled plan of liberty, but must in most cases lead directly to a breach of the peace. Nevertheless a considerable modification of this general law has been found necessary in a few glaring cases. The Vagrant Act authorises constables to arrest suspected persons or reputed thieves frequenting docks, canals, wharves, and quays, and warehouses, and in short all highways and public places, with intent to commit felony. And in judging of this intent to commit felony, it is not necessary to show any overt or actual attempt at felony: it is enough if the justices shall be satisfied, that from the circum-

[1] Hall v Booth. 3 N. & M. 316.

[2] 13 Ed. I. Stat. Wint. c. 4.

stances of the case and from his known character, they are satisfied that such was the prisoner's intent.[1]

In some other cases it has been allowed, chiefly on account of the difficulty of otherwise detecting special offences, to stop and search persons who are not at the moment committing any offence as far as can be seen. Thus persons on board ships or boats within the limit of any port in the United Kingdom or Channel Islands, or who have landed from vessels, may be searched by any officer of customs or his assistant, if such officer has good reason to suppose that they are carrying smuggled goods about their persons, and any one obstructing the officer is liable to a penalty of ten pounds.[2] In like manner any constable may in a highway, street, or public place search any person, whom he may have good cause to suspect of coming from any land, where he shall have been unlawfully in search of game, and having in his possession any game unlawfully obtained, or any gun, or net, or other engine for killing game, and may stop and search carts also for a like reason, and then may summon such person for the offence.[3] And similarly a water bailiff, duly appointed under the Salmon Fishery Acts, may search and examine all nets and bags used by fishermen to carry fish, if there is reasonable cause to suspect them of having possession of fish illegally caught.[4] And if a person carrying a gun refuse to give his name and address when demanded by a constable who seeks to know, if the gun licence has been obtained, such person may be arrested and taken before a justice.[5] And some statutes relating to game, wild fowl, and other matters, give power to certain persons to demand the name and address of others, sometimes with and sometimes without the power to arrest those who refuse.[6] And within the limits of the metropolitan police district, a constable may stop and search any person who may be reasonably suspected of having or conveying in any manner something stolen or unlawfully obtained.[7] And such person may, on failing to give a satisfactory account to a magistrate as to how he came by

[1] 5 Geo. IV. c. 83, § 4; 34 & 35 Vic. c. 112, § 15. [2] 39 & 40 Vic. c. 36, § 184. [3] 25 & 26 Vic. c. 114, § 1. [4] 36 & 37 Vic. c. 71, § 36. [5] 33 & 34 Vic. c. 57, § 9. [6] 1 & 2 Wm. IV. c. 32, § 31; 39 & 40 Vic. c. 29, § 4. [7] 2 & 3 Vic. c. 47, § 66.

such goods, be imprisoned for two months. These are the main exceptions to the general rule, which prohibits any summary arresting and searching of persons in order to discover evidences of crime ; and they are all authorised by express enactments, founded on what is assumed to be the urgency of the particular cases.

In what cases arrest for crime is allowed without warrant.—Though the general rule is that no individual is justified in interfering with the liberty of another by stopping or imprisoning him, yet, in aid of the general peace, there has always been an exception, when a crime has been committed within the view, and the criminal might escape. And yet all crimes are not occasions for this justification. One distinction is somewhat strongly drawn between those crimes which are felonies or treasons on the one hand—these being the most serious of all crimes—and those of the petty kind, including all misdemeanours, on the other hand. As to any of the graver crimes, the law presumes that, if the criminal is actually seen in the act of committing it, so that there can be no reasonable doubt of guilt, then any bystander so witnessing the crime may seize and detain such offender, till the constable or peace officer has arrived to take the charge.

Arrest for treason or felony without warrant.—This then is the first cardinal rule applicable to the whole community, that any one may, without warrant, arrest another who is reasonably suspected of having committed treason or felony; and nothing is so reasonable as when the crime has been actually witnessed in some of its main stages by him who so effects the arrest. And hence to justify such arrest in any case, the party arresting must be able to show, if called upon, that a crime has been actually committed by some one, and that he reasonably suspected the person arrested, and stating such reasons.[1] And if the private person has nothing more to support his conduct than a well grounded suspicion, he cannot detain the suspected person, in order merely to ascertain whether he had committed a felony or not.[2] And it is in this preliminary matter, that an important distinction between private individuals and constables exists, for constables

[1] Beckwith v Philby, 6 B. & C. 638; Allen v Wright, 8 C. & P. 526. [2] Hall v Booth, 3 N. & M. 316.

are justified in arresting without warrant one who is reasonably suspected by him of having committed a felony, so that, though he has not seen the felony committed, yet on a report or information by one who is of reasonable credit, he may act on such information, and in doing so will have the protection of the law.[1] On the other hand, a private person is not justified in the arrest, if it turn out that he is mistaken. His justification rests on the truth of the fact, not on the reasonableness of the suspicion; and he must take all the risk of a false imprisonment on himself in case he is deceived by appearances.

Arresting persons attempting to commit felony.—Not only may any person without any warrant arrest one who has committed a felony, but he may also arrest one who has attempted to commit a felony, though such attempt is only a misdemeanour.[2] It has been sometimes said, indeed, that it is lawful for a private person to do anything to prevent the perpetration of a felony; but this is rather a striking than a correct mode of stating the law,[3] for an attempt to commit a crime must mean a proximate attempt to do so, and not a mere surmise of a secret intention.[4]

Arrest without warrant for breaches of the peace.—Another cardinal rule applicable to all exists as to breaches of the peace. A private person without a warrant may arrest any one, who is found by him actually committing a breach of the peace; but if the breach of the peace has been already committed, his power to arrest has ceased, unless he reasonably believe another breach of the peace will be immediately committed or the affray be renewed.[5] And some care is required in discriminating what amounts in the eye of the law to a breach of the peace. It means an actual assault committed by one person on another person, or such violent conduct as induces a spectator reasonably to expect an assault will be immediately committed; as, for example, when one is violently threatening bystanders:[6] or is standing at a door violently abusing

[1] Beckwith *v* Philby, 6 B. & C. 638. [2] R. *v* Hunt, Ry. & M. 93 R. *v* Howarth, Ry. & M. 207; Ex p. Scott, 9 B. & C. 446. [3] Year Book, 13 Ed. IV. fol. 9, pl. 4; Handcock *v* Baker, 2 B. & P. 260. [4] R. *v* Eagleton, Dearsl. 525; R. *v* Collins, L. & C. 471. [5] Price *v* Seeley, 10 Cl. & F. 39. [6] Howell *v* Jackson, 6 C. & P. 723.

inmates, and collecting a crowd, and exciting them to disturbance.[1] For to stand in the street calling a person names and collecting a crowd and obstructing the public way is itself a breach of the peace.[2] Yet the mere annoyance during a public meeting caused by one calling "hear, hear," and putting questions to a speaker and making comments, does not amount to any breach of the peace, and does not justify the chairman in giving into custody such person, though it may be a very good reason for turning him out as only obstructing the business in hand.[3] And so giving the lie to a person, and claiming a debt in noisy and scurrilous language, is no breach of the peace.[4] And for a like reason, where a person wilfully and violently rings a door bell, making noise and disturbance without cause, unless there is reasonable ground to believe that a breach of the peace will be committed, it is not a cause for arrest.[5] And yet in some places, as, for example, the metropolitan police district, and in all towns which are regulated by the Towns Police Act and other like local acts, a constable, and a constable only, on seeing the violent ringing of a door bell, may at once take such person into custody, it being a substantive offence in those localities.[6] And in all cases, where the occupier of a house turns a person out, and a constable is present, the latter cannot interfere, or do more than the occupier's servant can do, unless a breach of the peace is committed in his view, or is about to be committed.[7]

How far one may arrest without warrant for misdemeanour.—Where a misdemeanour has been committed out of the person's or constable's view, and is at an end, neither can then arrest the party without a warrant.[8] And it is the same, if the misdemeanour is of such a character, that it does not consist in any visible act of such a nature that it can be known, whether it is in course of being

[1] Webster v Watts, 11 Q. B. 311. [2] Cohen v Huskisson, 2 M. & W. 482. [3] Wooding v Oxley, 9 C. & P. 1. [4] Wheeler v Whiting, 9 C. & P. 262. [5] Grant v Moser, 5 M. & Gr. 123; 6 Sc. N. R. 46; Simmons v Milligen, 2 C. B. 533. [6] 2 & 3 Vic. c. 47, § 54; 10 & 11 Vic. c. 89, § 28. [7] R. v Mabel, 9 C. & P. 474; Howell v Jackson, 6 C. & P. 723; Shaw v Chairitie, 3 C. & K. 21. [8] R. v Curran, Ry. & M. 132; Fox v Gaunt, 3 B. & Ad. 798; Bowditch v Balchin, 5 Exch. 378.

committed or not.[1] Yet though the general rule at common law is, that a private person has no power to arrest one who has committed or is found committing only a misdemeanour, an exception has been recognised in the case of a notorious cheat using false dice.[2]

The power to arrest, without warrant, those committing any misdemeanours has sometimes been laid down broadly, and the doctrine pushed too far. But unless in the case of a misdemeanour which involves a breach of the peace or consists in public cheating, there seems no trustworthy authority, that private persons can arrest, without a warrant, the misdemeanant; and considering the danger of bloodshed and further breaches of the peace, it is not desirable, that any such power should be claimed, exercised, or encouraged. There is often no more urgent occasion to arrest another *brevi manu* for many misdemeanours than for an ordinary cause of action. The usual process of the law must be resorted to, and generally suffices for all reasonable purposes in the punishment of this class of offences. Nevertheless, as will be immediately seen, many statutes expressly authorise private persons, as well as constables, to arrest persons found committing many misdemeanours; and in such instances a statutory authority makes all the difference, and does not affect the general rule of law.[3]

Where a constable arrests for crime without warrant.—In the cases already mentioned wherever a private person can apprehend another without a warrant, a constable can also do so. But a constable has no greater power to apprehend than an individual, though he is justified in some cases where a private person would not be so. Thus an individual, who apprehends another, must not only have a reasonable suspicion that that party committed the offence, but must be able to prove that an offence was actually committed by some person: whereas, as already stated, the constable need only prove that he had a reasonable ground of suspicion, that the party had com-

[1] Horley v Rogers, 2 E. & E. 674. This case is merely an illustration of an offence not visible to the eye. [2] Hollyday v Oxbridge, Cro. Car. 324; Fox v Gaunt, 3 B. & Ad. 800; Hawk. P. C. 2, 12, 20. [3] Mathews v Biddulph, 4 Scott N. R. 54.

mitted an offence.[1] At common law therefore a constable has power to apprehend a party whom he reasonably suspects of having committed a felony;[2] though even a reasonable suspicion of a misdemeanour will not be enough.[3] The question what is a reasonable ground of suspicion justifying the constable, depends entirely on the circumstances and the characters of the informant and the suspected, both of which particulars the constable should weigh carefully. It is not reasonable, for example, that a twenty years' character for veracity as a householder, should be outweighed by the assertion of a mere stranger or travelling showman, that such householder committed a crime;[4] or that a like accusing statement should be accepted by one constable from another without the least inquiry;[5] or that an infant under seven committed a felony, seeing that the age alone negatives the possibility of any crime.[6] If the constable reasonably acts on the information of a person of apparent veracity and respectability and who requests the constable to arrest one, the informant, and not the constable, must take the risk of the truth of the charge, for it would be mischievous to throw this risk on the constable.[7] But if the informant does not request the constable to arrest, and merely submits the information for him to act upon or not to act, then the informant is not responsible. And where a party has been arrested, who is not liable to be arrested, but who has falsely represented himself to be a person who was inquired after, he has no remedy, for he caused the injury of which he complains.[8] And where a party has made two inconsistent statements as to his being the person for whom a legal warrant to arrest exists, he has no ground of complaint until a reasonable time has elapsed for the arresting party to make inquiry as to which is the true statement. And a constable in execution of his duty when arresting persons, is entitled in difficult cases to call on a bystander to assist him, and the latter will be indictable for refusal, even

[1] Beckwith v Philby, 6 B. & C. 638. [2] Ibid. 635; 9 D. & R. 487. [3] Bowditch v Balchin, 5 Exch. 380. [4] Hogg v Ward, 3 H. & N. 417. [5] Griffin v Coleman, 4 H. & N. 265. [6] Marsh v Loader, 14 C. B., N. S. 535. [7] Davis v Russell. 2 M. & P. 607; 5 Bing. 354. [8] Dunstan v Paterson, 2 C. B., N. S. 495.

though he is not quite satisfied that the apprehension would be lawful.[1]

Arresting persons found committing offences.—The case of persons found committing offences stands by itself. Where the offence is a misdemeanour, the party when found committing it may often be arrested without a warrant, but not after the misdemeanour has been committed and completed, and there is no prospect of its being repeated [2]; nor when there is no breach of the peace involved.[3] With regard to the expression "found committing" there are, as already stated, some offences which are of such a nature, that no individual can ever, strictly speaking, be found committing them, for an offence may consist in a mere neglect to do some act or attend to some duty, such as not to maintain a wife or a child.[4] The power to arrest cannot therefore apply to such cases. But the words "found committing" are to be distinguished from the words "just about to commit" and "just after the offence has been committed." Where this line ought to be drawn as to the antecedent and subsequent period of the committing of an offence, is often a difficult question.[5] And if the commission of an offence has been actually seen just before, and there is reasonable apprehension of its being continued, as is often the case of an affray, the offender may be arrested without a warrant.[6] In like manner, when a felony or misdemeanour has "just been committed" before the person arresting gets up to the spot, the criminal may be pursued if he run away. Thus where a man was seen in an outhouse, and a noise was heard, and he was next seen crouching in a neighbouring garden, and was pursued and taken on fresh pursuit, it was held that this was the same as if he had been taken at first in the outhouse.[7] But the pursuit must be continued in such cases without any long interval; and hence, if the

[1] R. v Sherlock, L. R. 1 C. C. 20. [2] Fox v Gaunt, 3 B. & Ad. 798; Simmons v Millingen, 2 C. B. 533. [3] Mathews v Biddulph, 4 Scott, N. R. 54; R. v Wilks, 2 Wils. 159; 2 Salk. 698. [4] Horley v Rogers, 2 E. & E. 674. [5] R. v Curran, 3 C. & P. 397; R. v Phelps, Car. & M. 180; R. v Gardner, Ry. & M. 390; Downing v Capel, L. R., 2 C. P. 461. [6] Price v Seeley, 10 Cl. & F. 28; R. v Light, D. & B. 332. [7] R. v Howarth, Ry. & M. 207; R. v Hunt, Ry. & M. 93; Hannay v Boultbee, 1 M. & Rob. 14; 4 C. & P. 350; R. v Fraser, Ry. & M., 419; R. v Price, 7 C. & P. 178.

prisoner escape and be not seen again for five hours, or if the person attacked go away for two hours to fetch assistance, it is too late to effect the arrest, as the continuity of the transaction is broken.[1]

What offences justify arrest if found committed.—Over and above the rule at common law which authorises the arrest without warrant of any person found committing a felony or a breach of the peace, express power is conferred by some of the Criminal Law Consolidation Acts upon all persons to arrest without warrant anyone who is found committing not only felonies, but misdemeanours, and also offences punishable by summary conviction. Such are those which fall under the head of larceny and its varieties.[2] A like power is given, but only to constables and to the owner and the servants of the owner of any property maliciously injured, and it is also given in coining offences. In each of those instances a person found committing the offence may be at once arrested, the only exception being a trespasser's angling in the day-time, for which no arrest can be made at all.[3]

As already stated in reference to some kinds of vagrants, any person may apprehend a party found committing their offences.[4] In poaching game also, only the owner or occupier, and sometimes only a constable, can arrest. Any one may arrest an unlicensed hawker.[5] While in case of unlicensed pedlars, only a constable or the occupier of the premises, or the person to whom goods are offered for sale, can make the arrest.[6]

[1] R. *v* Gardner, Ry. & M. 390; R. *v* Walker, Dearsl. 358; R. *v* Marsden, L. R., 1 C. C. R. 131. [2] 24 & 25 Vic. c. 96, § 103.

[3] 24 & 25 Vic. c. 96, c. 97, c. 99. The chief misdemeanours and summary offences contained in the Larceny Act (24 & 25 Vic. c. 96) are setting engines to catch deer; killing hares and rabbits in warrens in night-time; stealing dogs, or possessing stolen dogs, or taking money to restore stolen dogs; stealing domestic birds and beasts; killing pigeons; poaching fish; dredging oysters; stealing shrubs, fences, fruits, and vegetables; hawking shipwrecked goods.

The misdemeanours and summary offences mentioned in the Malicious Injuries to Property Act, 24 & 25 Vic. c. 97, are wounding and injuring dogs and domestic animals; damaging fences; damaging property; damaging trees, vegetables, ponds, bridges, toll-bars, telegraphs, works of art, obstructing railway engines, destroying fixtures. [4] See *ante*, p. 34.

[5] 50 Geo. III. c. 41, § 20. [6] 34 & 35 Vic. c. 96, § 18.

No person can however act with certainty in reference to so many miscellaneous offences unless well acquainted with the particular statute relating to each subject.

Special local statutes giving authority to arrest.—It would be impracticable to enumerate all the instances, besides those already mentioned, in which a person "found committing" an offence may be arrested by anyone who so finds the offender; for there are many petty offences which can only be punished in a summary way by justices of the peace, as to which particular statutes give this authority. And as no method exists in the matter, and no human memory can retain those instances in which the power is given or not given, it is thus safer to act on the principle, that no power exists unless the particular knowledge is acquired with certainty. In some cities and towns governed by local acts there is often power given to anyone or to a constable to arrest persons found offending, though the general law may give no such power as to analogous offences committed out of those limits. And in the metropolitan police district the same remark may be made, for within the limits of those special acts things are made offences, and persons found committing those offences may be arrested, which would not be so treated beyond the limits.[1] In all such cases nothing but minute and particular knowledge can be safely relied upon in any emergency of daily life and conduct.

Arresting persons loitering in highway by night and suspected.—Any person who is found loitering in a public highway or like place during the night may be arrested without a warrant by any constable, if the latter suspect him of having committed or being about to commit a felony, such as larceny, murder, or malicious injuries.[2] Indeed in all offences committed during the night, if the offender is found committing them, he may be arrested without a warrant, whether the offence is a misdemeanour or a felony.[3]

How far a trespasser on premises can be arrested or given in custody.—There is one case in which the power to arrest, or, which is the same thing, to give into custody of

[1] 2 & 3 Vic. c. 47; c. 71. [2] 24 & 25 Vic. c. 96, § 104; c. 97, § 57; c. 100, § 66. [3] 14 & 15 Vic. c. 19, § 11.

a constable, is often greatly mistaken, and as it is a matter which gives rise to much provocation, and therefore to false imprisonments, it may here be noticed, though in strictness it belongs also properly to the subject of trespass on real property. The owner or occupier of property is often tempted to arrest or give into custody a person who is found trespassing on such property, whether in fields, or gardens, or houses, and sometimes after notice not to trespass has been expressly given to such person. In all these cases, whether after notice or not, the occupier is not as a matter of course entitled to treat such trespass as a criminal offence, unless he is satisfied, that the trespasser has committed or is about to commit some other offence known to the law, in addition to the mere trespass, such as larceny, poaching, destroying of trees, and so forth. By the law of this country mere trespass on real property is only a cause of civil action and nothing more, and unless some other specific offence of a criminal complexion is added to it, the trespasser cannot be given into custody, because he cannot be charged with that kind of offence authorizing any such arrest. All that can be done to a trespasser is to request him to leave the premises, and if he refuse, he may be pushed out with sufficient force, and no more than is necessary to overcome his resistance and to get rid of him. Others may be called in aid to assist in so pushing off the trespasser, but all the liability the trespasser incurs is merely a liability to an action of damages for the trespass, and no more. The Vagrant Act, it is true, enables one to be treated as idle and disorderly, if he is found sleeping in outhouses; but the gist of that offence is not the mere fact of trespassing, but the not being able to give an account of himself, or having no visible means of subsistence, and it is because the two ingredients are mingled that the offence arises. There is only another species of trespass which the Vagrant Act treats as punishable summarily, and one as to which the party found offending may be arrested, and that is "being found on premises for an unlawful purpose." But these words mean a specific criminal offence, and not a mere actionable wrong, or a mere immoral act. Hence, as was stated in a former chapter, persons who trespass in a private house cannot be arrested by the occupier under this statutory

power.[1] And where the occupier on one occasion gave into custody men found in his house courting maid-servants and eating his provisions given wrongfully by the servants to the men, it was held that he had no right to give them into custody unless he was able to charge them with felony, namely, larceny of the food they consumed.[2]

Mode of making arrest for criminal offences.—When a private person arrests another for some offence, he should always notify what the offence is, if the party arrested is not reasonably cognisant of it. In the time of Edward I. it was the rule for a bailiff to arrest an evildoer by approaching him with a white wand and summoning him to surrender peaceably.[3] No particular symbol of authority is now required. But it is the duty of a private person or constable, after apprehending a party, to take or carry him without unnecessary delay before a justice of the peace and charge him with an offence. And the justice must immediately discharge the party, if there is no one to make a charge, for he has no power to detain anyone till a charge be actually made.[4] When a person has been arrested by a constable on a charge of felony, it is not for the prisoner to argue about the precise terms of the charge, but he must go peaceably; and if he kill the constable this will be murder.[5] On the other hand, if no felony has been committed or charged, and some one tells the constable simply to take the prisoner in charge, having no right to do so, should the prisoner stab the constable and kill him, this is held to be only manslaughter, as there was some just provocation.[6]

Arresting without warrant on hue and cry.—There is a species of authority under which arrests are sometimes made which dispenses to some extent with a warrant or with the qualification of actually witnessing the perpetration of a crime. One of the traditions of Rollo, who lived about 900, was the *clameur de haro*, or a raising of the county when robbery, murder, or assault was perpetrated.[7]

[1] Hayes *v* Stevenson, 3 L. T., N. S. 296. [2] Kirkin *v* Jenkins, 32 L. J., M. C. 140. [3] Year B. 20 Ed. I. 127; Britt. b. ii. c. 22, § 6. [4] R. *v* Birnie, 5 C. & P. 206; 1 M. & Rob. 160; Edwards *v* Ferris, 7 C. & P. 542. [5] R. *v* Ford, R. & Ry. 329; R. *v* Bentley, 4 Cox, C. C. 406. [6] R. *v* Thompson, 1 Ry. & M. 80. [7] 1 Stubbs, Const. II. 248.

And the avenger of kindred in Wales had the duty to proclaim all murderers and thieves by sound of horn, and to pursue and bring them to punishment.[1] And by express statute those who refused to join in the hue and cry, and to arrest felons, were liable to a fine.[2] The *Mirror* says, that every one above the age of fourteen was bound to hold himself ready to kill mortal offenders in their notorious sins, or follow them from town to town with hue and cry.[3] In the time of Edward I. the reluctance of people to prosecute offenders was felt, and it was enacted that immediately after robberies and felonies committed, fresh suit was to be made from town to town, and from county to county.[4] And if the robbers were not found after forty days, the hundred was to answer for the damages.[5] A later statute reduced the liability of the hundred to half the damages, and this was to be assessed by justices on the inhabitants. But the same statute said that no hue and cry was to be lawful, except made by horsemen and footmen, and the party robbed was to give notice to the justices, and was bound to prosecute.[6] Though this process of hue and cry is obsolete, yet a rule still exists of protecting against actions those who arrest a person by mistake, if there is a reasonable belief amongst a crowd that such person had committed a felony.

What authorities issue warrants to arrest for crime.—Though the usual course in this country has long been to obtain a warrant from justices of the peace to arrest any kind of criminal, and they are the ordinary authorities who issue such warrants, it may be well to notice one or two other authorities who may authorise a warrant to issue, having a similar effect.

Warrants issued by others than justices of the peace.—As already stated, a secretary of state or privy councillor may issue a warrant to arrest for treason.[7] And where the House of Commons has determined to impeach an individual, whether a peer or commoner, in the former case he

[1] Anc. Laws, Wales, 246, 652. [2] 3 Ed. I. c. 9; 4 Ed. I.
[3] Mirror, c. 1, § 3. The ancient Egyptians made it a capital offence not to assist one who was slain by violence.—2 *Kenr. Egypt.* 55.
[4] 13 Ed. I. st. 2, c. 1. [5] Ib. c. 2; 28 Ed. III. c. 11. [6] 27 Eliz. c. 13. [7] R. *v* Kendal, 1 L. Raym. 65; 1 Salk. 347.

is taken into custody by order of the House of Lords,[1] and in the latter case by the serjeant-at-arms;[2] though impeachment is in modern times rarely resorted to, being, as Lord Somers said, like Goliath's sword, kept in the temple not to be used except on great occasions.[3] And the justices of the Queen's Bench Division, being official justices of the peace for all England, each of them may issue a warrant to arrest for felony.[4] And any justice of oyer and terminer can issue a warrant to arrest felons.[5]

Whence justices obtained power to issue a warrant to arrest.—But the chief and ordinary ministers of the law for issuing warrants to arrest criminals, and inquire into the charge, are justices of the peace. Though a justice of the peace in granting a warrant to arrest, usually acts on the information of others, yet if he has himself witnessed the commission of a felony or breach of the peace, he may either with his own hands arrest the party, or he may grant a warrant for a constable to do so.[6] How a justice of the peace first got this power, which is now practically confined to his office, has been matter of dispute. Coke said, that no statute had expressly given to him the power, and that none could be inferred, to arrest a person on suspicion and before indictment.[7] But Hale said it was necessarily inherent in the very office of justice of the peace, since there must be some one who is to judge of the reasonableness of putting persons on their trial, and to take steps for that end, and a justice of the peace and no other was the judge to do it. If it were not so, malefactors would constantly escape.[8] In this controversy it may well be that Coke was the better lawyer, and Hale the better lawgiver; and, indeed, the functions of courts and legislature formerly often overlapped each other, and few could trace the dividing line. But whencesoever derived or usurped, it was as well, that the practice came at last to be what Hale thought it; and this indeed has been the way in which much of the common law has been created. In modern times, and at least since 1848, express power of this kind is given by statute to all justices of the peace,

[1] 20 Lords J. 112; 27 Ibid. 19. [2] 16 Com. J. 242; 42 Com. J. 793; May's Parlt. 661. [3] 16 St. Tr. 1394. [4] 1 Hale, 578. [5] Ibid. 579. [6] 2 Hale, P. C. 86; Butt *v* Conant, 1 B. & B. 548. [7] 4 Inst. 177. [8] 1 Hale, 579; 2 Hale, 79, 80, 107.

to grant summonses or warrants to answer the charge of any indictable offence.[1]

If warrant required to arrest libellers.—It may here be noticed that before 1848 there used to be much difference of opinion, as to how far libellers could be arrested before indictment found, which was only another phase of what has previously been noticed on that subject under the head of articles of the peace.[2] In 1817, the Secretary of State was advised by the law officers, that a justice of the peace may issue a warrant to apprehend any person charged on oath with the publication of a blasphemous or seditious libel, and compel him to give bail to answer the charge. But in parliament this power was openly questioned, and with great learning and ability.[3] Elaborate arguments were delivered by legislators on the subject. And in 1820 Lords Grey and Erskine said they still considered it illegal for justices to commit parties charged with libel before indictment found.[4] But the controversy was practically put an end to by the enactment in 1848, giving power to justices to hear charges for all indictable offences, and as a consequence, if needful, to arrest by warrant the defendant for the preliminary investigation.

How criminal charge is commenced before justices.—In all indictable offences, therefore, it is competent to proceed in the first instance, by applying to a justice of the peace to cause an accused person to be summoned or arrested and brought before him, in order that there might be a preliminary investigation into the truth of the charge. If in the opinion of the justice, after all the evidence has been heard, there is apparently truth in the charge, or at least sufficient doubt to require more thorough examination, then the justice may commit the accused for trial. In a few cases, under very recent statutes, two or more justices have power not only to hear the charge in the first instance, but to decide upon it finally; in which case the punishment can be awarded by such justices, and the law is thereby satisfied. There are also many criminal offenders, who may be arrested, as has been already shown, without any warrant, and then brought before a justice of the peace to be charged. But where the offender has not

[1] 11 & 12 Vic. c. 42, § 1. [2] See *ante*, Ch. i. [3] 36 Hans. Deb. (1st) 445, 1158; 3 Sidm. Life, 176. [4] 1 Parl. Deb. (2nd) 1323.

been so arrested, and is still at large, the mode of proceeding usually adopted is to apply to a justice of the peace for a summons or warrant against such offender. This course is not imperative, for any person can, except in a few cases, go before a grand jury and make a charge; and if the grand jury find a true bill, a warrant can then be issued to arrest the offender, and this may be the first notice the offender receives of his accusation. But where the resort to a justice of the peace is first had, and this is universally acknowledged to be the fairest course, the informer or prosecutor proceeds as follows.

At whose instance a warrant to arrest is obtained from justices.—When a person makes a charge of an indictable offence against another to a justice of the peace, the justice may either issue a summons requiring the attendance of the accused before him at a time and place mentioned, or may in the first instance issue a warrant authorising his immediate arrest. In the latter case the charge requires to be put in writing, and sworn to by the prosecutor. The summons as well as the warrant is under the hand and seal of the justice who issues it, and it may be issued on Sunday as well as any other day.[1] It must also state shortly the matter of information or the offence, and must name, or describe the offender.[2] A warrant to arrest should bear the date, and also express the place, where it was made, yet this last particular is not absolutely essential.[3] But it is necessary that at least the county shall be named, seeing that a warrant of a justice of the peace cannot be executed out of the county (or within seven miles more in case of fresh pursuit) unless it is backed by the justices within whose local jurisdiction it is executed.[4]

Essential parts of a warrant to arrest.—Of all those more formal matters already mentioned, one vital essential part of a warrant is the name of the person to be arrested. A general warrant to apprehend all persons suspected, without naming them, as has already been stated, is altogether void; and any person seized may defend himself in person against being taken, or if taken may bring an action of false imprisonment.[5] There is no statute which

[1] 11 & 12 Vic. c. 42, §§ 1, 4, 8. [2] Ibid. §§ 9, 10. [3] 2 Hale, 111. [4] 2 Hawk. c. 13, § 23; 11 & 12 Vic. c. 42, sched. [5] 1 Hale. 577; 2 Hale, 112; see *ante*, p. 129.

now authorises this mode of arresting suspected persons without naming them. It is true that the want of such a power is very much obviated by the practice in modern acts of parliament, defining offences and authorising constables, and sometimes owners of lands, and a few persons connected with the subject matter, to arrest parties found committing the offence, without any warrant at all. Such is the course under the Malicious Injuries to Property Act, the Larceny Act, the Vagrant Act, the Game Acts, Fishery Acts, and many other acts besides.

How far party to be arrested must be named in the warrant.—But though a warrant to arrest for crime is void without naming the party to be arrested, it is not absolutely necessary to describe him by name, when that is practically impossible. It is enough to identify him otherwise, as by describing him as a person whose name is unknown, but who has certain marks of identity, which are specified.[1] To omit the christian name, is the same thing as to omit the name altogether, and unless other identifying circumstances are stated, the writ is void.[2] And it will not cure the warrant to fill in the name of the person after the arrest.[3] The practice, indeed, of issuing blank warrants in this way seems at one time to have prevailed, but was condemned by Hale as utterly irregular.[4]

How far offence charged must be described in warrant.—The warrant must set forth the special cause or matter, on account of which the party is to be arrested. It was at one time held to be enough to allege, that the party was wanted to answer such matters as should be objected to him—an allegation which means nothing, and might as well have been omitted; and it is surprising that some authors seem to have seen no objection to a warrant so drawn up.[5] But the doctrine, that a special statement of the cause of arrest was necessary, was maintained by several writers.[6] And not only is some definite statement of the offence necessary, but it must also appear in the warrant, that it was granted after hearing evidence on oath.[7] And this is, at least since 1848, for good reason, because a justice has

[1] 1 Hale, 577. [2] R. v Hood, 1 M. & M. 281. [3] R. v Winwick, 8 T. R. 455; 2 Hale, 114. [4] 1 Hale, 577. [5] Dalt. c. 169; 2 Hawk. c. 13, § 25. [6] Lamb. 87; 2 Hale. 111. [7] Candle v Seymour, 1 Q. B. 889.

no power to issue a warrant except on the oath of a credible witness.[1]

It has been doubted whether, after justices have once issued a warrant to arrest, they can withdraw it, and so cancel the authority given to arrest. It would be singular if, on discovering some mistake, they could not, like the rest of mankind, rectify such mistake, and lessen the injury which may result from the warrant being executed. Nor is it easy to see how any abuse could arise from their doing so, since all kinds of misconduct, including that of cancelling a warrant for some corrupt cause, may be corrected by criminal information, should the circumstances of any particular case show a bad motive.[2]

How warrant to arrest is executed.—The warrant may be executed at any time after its date, at least while the justice who signed it is alive;[3] and the offender may be apprehended anywhere within the county of the justice who signed it, or in case of fresh pursuit, within seven miles in a straight line from its boundary.[4] And any constable acting for any place within the county, may execute the warrant.[5] And as a justice may issue the warrant on a Sunday, so the warrant may be executed on that day.[6] The warrant may be executed in the night-time as well as during the day.[7] If the accused is not within the county, or jurisdiction of the justice signing the warrant, or within seven miles of it, then the warrant cannot be legally executed until it is indorsed by some justice, who has jurisdiction in the place where it is to be executed; and when so indorsed and executed, the

[1] 11 & 12 Vic. c. 42, sched.

[2] Barons *v* Luscombe, 3 A. & E. 589; 5 N. & M. 330. The point was left open in this case, but the second warrant was assumed not to be within the authority of justices, and moreover, the first warrant was treated as a judicial, not a ministerial act, both of which points are most important. [3] Dickenson *v* Brown, 1 Peake, 234.

[4] 11 & 12 Vic. c. 42, § 10. [5] Ibid. [6] Ibid. § 4.

PLUTARCH says, the Romans were so tender of life, that when a person was accused of a capital crime, and did not appear, an officer was sent to his door in the morning to summon him by sound of trumpet, and the judges would not pass sentence before so public a citation.—*Plut. C. Gracch.* How much more tender are we of life, seeing that no man can be either tried or sentenced unless he is present at his trial and hears all that is said against him.

[7] 9 Rep. 66 a.

accused may be taken either before a justice of the first county or the second, according to the indorsement of the warrant.[1] The constable who seeks a justice to indorse a warrant, must prove the handwriting of the justice who issued it.[2] And a warrant when backed, may be executed not only in all counties of England, but in Scotland, Ireland, the Isle of Man, and the Channel Isles.[3]

When an officer executes a warrant to arrest for crime, he ought first to state the substance of it, though he is not bound to show the warrant itself in case of felony. And in case of arrest for felony *flagrante delicto* no authority is needed, for all may then arrest without warrant.[4] A usual and sufficient notice to the party arrested is, "I arrest you in the Queen's name," but it must be accompanied with some act denoting that force will be used if necessary.[5] Though, however, a known officer is said not to be required to show any warrant for felony, this is a dangerous practice and ought to be discountenanced, for no man's liberty ought to be left to the word of another, and there is a manifest satisfaction even to the accused, when the truth of the warrant can be made at least more probable by a formal document.[6] And as the warrant is the sole justification of the constable, he ought not on any account to part with it.[7] Moreover, unless the warrant is for treason or felony, the constable executing it must have the warrant in his possession, for no man is bound to surrender in such cases without seeing some regular authority for his arrest, and the only regular authority is a warrant. Even though the prisoner does not demand a sight of the warrant, it is not the less incumbent on the constable to have it in possession, and unless he so has it, the prisoner may defend his liberty, at all hazards, against all the world.[8] The person to whom the warrant is addressed, is he who is bound to execute it; and if he call others to aid him, still he must be present or sufficiently near, in order to render the arrest by others

[1] 11 & 12 Vic. c. 42, § 11. [2] Ibid. [3] Ibid. §§ 12, 13, 14 14 & 15 Vic. c. 55, § 18. [4] 2 Hawk. c. 13, § 28; 2 Hale, P. C. 116 1 Hale, P. C. 458. [5] Dalt. C. 169; Genner *v* Sparkes, 1 Salk. 79 6 Mod. 173. [6] Hall *v* Roche, 8 T. R. 188. [7] R. *v* Wyatt, 2 L. Raym. 1189. [8] Galliard *v* Laxton, 2 B. & S. 363; Codd *v* Cabe, 45 L. J., M. C. 101.

legal.[1] The power of the warrant is, however, not exhausted, if the party has not been effectually arrested under it.[2] As the warrant must name the person to be arrested, the risk of arresting the wrong person is on the officer, and it is no justification that a mistake was made.[3]

When the warrant is addressed to a private person, which is also a dangerous and reprehensible practice, he cannot compel third parties to assist him.[4] But it is different, when a justice himself arrests, or a sheriff or constable is authorised to do so. They cannot indeed capriciously, but they may for good cause call upon the *posse comitatus* to assist, that is to say, all persons, except women and children and those who are disabled, are bound on request to give assistance, and if they refuse they are liable to indictment, and fine, and imprisonment.[5]

When an arrest under warrant may be resisted.—In all cases, where a prisoner is committed by justices on depositions, the illegality of the commitment is no reason why the prisoner is entitled to discharge by *habeas corpus*, for there may be sufficient in the depositions to show, that a crime has been committed, though the warrant may be bad, and in such a case the court will not discharge a prisoner by *habeas corpus* before trial.[6] The utmost that can be done, is to commit the prisoner to be further examined before a competent magistrate.[7] But as it is essential that the person arrested should be able to satisfy himself, whether he is legally arrested, since no one is bound to submit to an illegal arrest, it seems that, if he is misled by a defective warrant being produced to him, he cannot be made responsible merely by the fact of another unknown and unobjectionable warrant existing. For if the warrant is addressed to the constables of W., and a constable of W. executes it out of his jurisdiction, the arrest is void.[8] If, on the other hand, all the warrants good and bad are shown, then the party arrested cannot justify any resistance. And in criminal cases, though the crime be felony, and no warrant be necessary, yet the officer

[1] Blatch v Archer, Cowp. 66; 2 Hawk. c. 13, § 29. [2] Dickenson v Brown, 1 Peake, 234. [3] Bell v Oakley, 2 M. & S. 261. [4] 1 Hale, 601. [5] Dalt. c. 171. [6] R. v Marks, 3 East, 157. [7] Ex p. Kraus, 1 B. & C. 258; Ex p. Scott, 9 B. & C. 446. [8] R. v Weir, 1 B. & C. 288.

cannot lawfully arrest the criminal under a warrant, if the warrant misname him.[1] It is true, however, that if the officer know a felony is committed, he may throw the warrant aside, and act independently of it altogether.

Breaking into a house to arrest a person charged.—Not only may a person be arrested in criminal cases under a warrant, wherever he is found, but his own or another's house may be broken into, if necessary, to effect the arrest. Yet it is absolutely necessary, before breaking open the door, that the constable shall signify, to those who are within, the cause of his coming, and request admittance. If admittance be refused, then, and then only, he can break open the outer door.[2] And this rule is not confined to cases of misdemeanour, for the reason of it is, as Abbott, C. J., observed, that, "if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be?"[3] It has been laid down by Coke, that a justice of the peace's warrant, if granted on mere surmise and before indictment, does not authorise the constable to break open the doors to take the offender.[4] But the practice seems to have been the contrary, and considering that the justice must now, before issuing the warrant, have the oath of some one as to the fact, it seems impossible on any principle to confine the right of breaking open doors to the case of a warrant for a felony, actually seen to be committed.[5] But in case of a private person executing the warrant, such a distinction may well prevail, and such person must take the risk of not finding the criminal within.[6] And it is scarcely necessary to add that, if a person, who has been lawfully arrested, escapes into a house, that house may be broken into in order to arrest him.[7]

The legality of an arrest is important, inasmuch as the competency of the prisoner to defend himself depends on this point, and the responsibility of the acts that may be done in course of executing the writ. It has

[1] Hoye v Bush, 1 M. & Gr. 775. [2] Launock v Brown, 2 B. & Ald. 592. [3] Ibid.; Burdett v Abbott, 14 East, 163. [4] 4 Inst. 177. [5] 1 Hale, P. C. 580; 2 Hale, P. C. 117. [6] 1 Hale, P. C. 82; 2 Hale, P. C. 92. [7] 2 Hawk. P. C. c. 14, § 9.

As to the right to break into a house to execute any civil process for debt, see *post*, Chap. viii. "Punishment."

been laid down, that if a person flee for felony, and defend himself so that he cannot be taken, the officer may kill him.[1] This is, however, so extravagant a proposition that the strictest proof of necessity for such an extreme measure, and of the legality of the warrant acted upon, is demanded, and ample notice of what the crime is, for which the arrest is sought to be made. And even with all these preliminaries, it is scarcely possible to comprehend, on what rule of law or justice, it can be necessary to slay an escaping offender, since all men, whether good or bad, prefer liberty to imprisonment, and that is part of the law of nature—if any such law exists or ever existed. It is rightly deemed a criminal offence for third parties to oppose an arrest for felony or treason. And the party opposing is deemed an accessory to the felony.[2]

After arrest, party must be charged without delay.—The duty of the officer, after arresting a party for crime, is to abstain from unnecessary harshness. The prisoner is to be kept in safe custody and nothing more. Hence if handcuffs are put on him, except where they are necessary to prevent escape, an action will lie against the officer.[3] And when the party has been arrested for crime, the officer in charge is bound within a reasonable time to take him before a justice of the peace, in order to have an inquiry into the charge. If any one of several justices is competent to entertain the charge, then the officer has an election to choose the justice. And if there is not time, or any other reasonable cause for not taking the prisoner the same day before a justice, then the officer may keep the prisoner in a house or a secure place till next day; but keeping a prisoner three days waiting for the prosecutor's witnesses is wholly unjustifiable.[4]

Examination of witnesses in presence of person charged.—At the hearing of the charge, it is essential, that the witnesses be examined on oath in presence of the accused—that the accused shall either himself, or by his advocate, be at liberty to cross-examine each of them—that the evidence of each shall be taken down in writing,

[1] 1 East, P. C. 312; 2 Hale, P. C. 119. [2] 1 Hawk. P. C. c. 17, § 1. [3] Wright *v* Court, 4 B. & C. 596: 6 D. & R. 623; 2 C. & P. 232. [4] Ibid.: Evans *v* McLoughlan, 4 Macq. App. 89.

and signed by each witness and by the justice.[1] If a witness is dangerously ill, and not likely to recover, and so cannot attend the justice, the evidence of such witness may be taken by the justice going to the witness, whether the evidence of the witness is in favour of or against the accused, and the accused is entitled to have notice and to be present at the examination of the witness, and to cross-examine the witness if necessary.[2]

Statement of person charged may be received.—When the examination of all the witnesses for the prosecution has been concluded and put in writing and signed, the depositions must all be read over in the presence of the accused, when the justice must address to him these words, or words to some similar effect: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything, unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence against you upon your trial: you are clearly to understand that you have nothing to hope from any promise of favour, and nothing to fear from any threat which may have been held out to you to induce you to make any admission or confession of your guilt, but whatever you shall now say may be given in evidence against you on your trial, notwithstanding such promise or threat.[3] Do you desire to call any witnesses?" If the accused shall in answer desire to call witnesses, the witnesses for him may be compelled to attend as in the case of those for the prosecution, and may be examined and cross-examined, and their evidence will be put in writing and then signed by each witness and by the justice.[4] And when all the depositions are completed, and when the accused person's statement, if any, shall be taken down in writing and signed by the justice, then the justice may commit the accused for trial.[5]

There was long a most unaccountable reluctance of courts to allow witnesses for prisoners and defendants to be heard in the earlier stages of accusation, though Coke said there was no authority for refusing to swear witnesses for a prisoner.[6] To the credit of Queen Mary it is related

[1] 11 & 12 Vic. c. 42, § 17. [2] 30 & 31 Vic. c. 35, §§ 6, 7; see *ante*, vol. i. p. 468. [3] 11 & 12 Vic. c. 42, § 18. [4] 30 & 31 Vic. c. 35, §§ 3, 4. [5] 11 & 12 Vic. c. 42, §§ 17, 18. [6] 3 Inst. 79.

that she first impressed on courts the important duty of hearing a prisoner's witnesses.[1]

In some countries a party charged with crime is not only a competent witness, but is expected to give his own account of the circumstances, and explain away if he can, subject to cross-examination, all that seems suspicious against him; and the records of nearly every civilised country abound in evidences that not only this questioning was once allowed, but that he was often put to the rack and tortured till he told all he was supposed to know. As will be stated hereafter, torture has for two centuries and more disappeared from our practice, and the practice of questioning a prisoner, which is only a remnant of the practice of torture, whatever form it assumes, has also been discountenanced, except so far, that if an accused person choose the end of the hostile evidence to give his own account, it will be received and taken along with the other evidence submitted to a jury. But in no respect is any accused person allowed to be cross-examined, nor is any evidence obtained from him in that way allowed to be received or to be listened to, if against the prisoner's wish.[2]

If place of examination of person charged is a public court.—Though the publicity of the accusation is always considered a protection to the accused, yet the place where a justice sits and hears a charge, with a view to committing the accused to another tribunal for trial, is not deemed an open court. Whether the public may be admitted, is a matter entirely in the discretion of the justice; but in practice all persons are allowed to attend, except when details are indecent and unfit for a general audience.[3] Before 1848, when an express enactment first defined the law, it was held, that all the public were entitled to attend, though the justice could in his discretion refuse to allow an attorney or any other person, either on the part of the accused or the prosecutor, to appear and interfere in the proceedings.[4] The reason then given was, that the sitting

[1] Hollingsh. 1112.

[2] Among the Kaffirs at this day the maxim is, not that the prisoner is innocent, but that he is guilty; and he is cross-examined by the accuser and any others who please.—*Maclean's Kaffirs*, 37.

[3] 11 & 12 Vic. c. 42, § 19. [4] R. v Borrow, 3 B. & Ald. 432; Cox v Coleridge, 1 B. & C. 37; R. v Staffordshire, 1 Chitt. R. 218.

of a justice to hold a preliminary inquiry as to an indictable offence was not in reality a court of justice to decide upon the guilt or innocence of a party, but only like that of a grand jury, a sitting to entertain an *ex parte* proceeding or application.[1] And to permit an attorney to be present was thought to be offering facilities to communicate with accomplices. Those reasons have lost their force as regards solicitors appearing for the accused; but the present statute declares at the same time, that this preliminary hearing is not in open court, though in practice it is almost invariably treated in that way.

Hearing of charge may be adjourned.—Such is the outline of the ordinary mode of dealing in the first instance with one who is accused of an indictable offence before a justice of the peace. It happens, however, frequently that the hearing of the charge cannot be concluded in one day, and that an adjournment for several days, or even weeks, may be desirable. Considering that one who is accused is generally in custody, and that to release him from custody may be inexpedient, it is obvious that it ought not to be left to the uncontrolled discretion of any justice of the peace to postpone the inquiry and indefinitely continue the imprisonment of the accused, either to suit the convenience or the exigencies of the situation of prosecutors and witnesses. It is accordingly not in the power of a justice to postpone the examination of an accused person, after it has been once commenced, for a greater period than eight clear days.[2] And the prisoner must be remanded under a proper warrant, specifying the day of examination and the day when the next is to take place; and this warrant must be under the hand and seal of the examining justice, and is the legal authority for continuing the custody. It is true, if the remand is for a time not exceeding three clear days, a verbal direction of the justice to the constable will be sufficient. And before the end of the days of the remand the justice may nevertheless, if expedient, order the accused to be brought before him. On the occasion

[1] Cox *v* Coleridge, 1 B. & C. 37; Collier *v* Hicks, 2 B. & Ad. 663.

[2] The eight days must be clear days, that is, between the last and next day of examination. If examined on the second day of the month, he must be again examined not later than the eleventh day.

of asking a remand, it is also competent for the justice instead of committing the accused to prison, to discharge him on his recognisance, with or without sureties, to reappear before him on the future day specified; and if he fail to do so, he may again be apprehended, and his sureties also be made to pay the sum forfeited by his non-appearance.[1]

Discharge of accused person if the evidence fails.—When a justice has concluded his examination of the accused, he must either discharge him or commit him for trial. If the result be, that the accused is discharged, this is not to be understood as being conclusive evidence of his innocence. The reason why the justice does not commit the accused usually is, that the evidence is not sufficiently cogent to satisfy a reasonable mind of guilt: but if there is a fair ground for doubt, and especially if that doubt is based on the respective credibility of conflicting witnesses, it is his duty to devolve the decision upon a jury, and commit the accused for that purpose. If the accused is discharged, he may or may not have a remedy against the person who put the law in motion against him, and this depends on principles which are discussed at length under the head of false imprisonment and malicious prosecution. If, on the other hand, the accused is committed for trial, the justice signs a warrant of commitment, by virtue of which the accused is sent to the proper gaol assigned in such circumstances.[2] And, if the accused has money sufficient to pay the expenses of conveying him to prison, the justice may order the money to be applied to such purpose.[3]

Prisoner entitled to copy of depositions.—One of the rights of the accused after he has been committed by a justice to take his trial for an indictable offence is, to demand a copy of the depositions, on which he has been committed, which he is entitled at any time after commitment to receive, on paying a small sum.[4] This, however, is not a general rule applicable to every case of imprisonment, but only to such an imprisonment as has been ordered after examination

[1] 11 & 12 Vic. c. 42, § 21. [2] Ibid. § 25. [3] Ibid. § 26.
[4] The price is three-halfpence for each folio of ninety words. 11 & 12 Vic. c. 42, § 27; 6 & 7 Will. IV. c. 114, § 3.

before a justice on a charge for an indictable offence, and after committal on such charge.[1]

Bail for accused persons.—Bail is a mode by which a prisoner is released from the custody of the law for a time, on an undertaking by one or more persons to take charge of him and render him again to the custody of the law when required. The sureties, to whose custody he is intrusted, are always bound to forfeit a sum of money, if they fail in their duty to keep him in their power and render him up; and they can at any moment change their mind and seize and redeliver their prisoner to the custody of the law, so as to exonerate themselves. Bail is only allowable in those imprisonments which precede the trial and sentence of the prisoner, for imprisonment when ordered as part of the sentence cannot be got rid of by bail. No court or judge, gaoler or justice of the peace, can then interfere, and none but the crown can put an end to an imprisonment which has been decreed to be in execution; and that is done by a free pardon.

The practice of bail, that is to say, of allowing an accused person as much liberty as is compatible with his being forthcoming when needed, may be said to be part of the law of nature, at least when civilisation begins; and Coke says the common law allowed all persons, even in treason and felony, to be discharged on bail.[2] But this scarcely agrees with the statutory recognitions of the practice.[3] Bail by justices had remained much in the same state from Edward I. to 1826.[4] At first it was compulsory to accept it, those who unjustly refused it being directed to be fined.[5] And yet it was said, justices of the peace used to have no power to bail those arrested on suspicion of felony.[6] But this was remedied, and two justices were invested with this power by a statute of Henry VII.[7] It was essential however that both should act together in

[1] R. *v* Humphreys, 19 L. J., M. C. 189; R. *v* London, 5 Q. B. 555; Ex p. Fletcher, 13 L. J., M. C. 67. [2] 2 Inst. 189. [3] Hale's Sum. 97. [4] 15 Parl. Deb. (2nd) 284.

[5] 3 Ed. I. c. 15. In the ordinances of the kings of France, about 1209, it was laid down, that bail was to be accepted for all crimes except homicide, murder, rape, and treason.—3 *Guiz. Civ. Fr.* lect. 13.

[6] 1 Rich. II. c. 3; 1 Rich. III. c. 4. [7] 3 Hen. VII. c. 3.

taking bail, and they were to certify in writing when they took it.[1] Selden argued, that in treason, murder, and felony a kind of discretion rather than a constant law had been exercised, when it stood wholly indifferent in the eye of the court whether the prisoner was guilty or not; the imprisonment, if any, being only for safe custody. But in offences of the second sort, those punishable by fine and imprisonment, unless a statute directed the contrary, bail was by the constant course allowed, and this bail was of right.[2] The Bill of Rights especially mentioned that excessive bail was not to be required.[3] In all misdemeanours it is said, that the prisoner has a right to be admitted to bail, and to refuse bail was described by the Habeas Corpus Act as well as the Bill of Rights an offence against the liberty of the subject.[4]

Bail on remand of prisoner during preliminary examination.—In modern practice bail is liberally dealt with. During the hearing of the preliminary charge on an indictable offence, if the examination for any reasonable cause requires to be deferred to a future day, the justice who has heard the charge may in his discretion, instead of remanding the prisoner to the common gaol, discharge him upon his recognisance with or without sureties.[5] The period of such remand is limited to eight days; and the enactment is confined to cases of felony and misdemeanour.[6] And any discretion in the committing justice as to admitting bail does not exist in cases of treason, but his discretion is absolute as to felonies and some of the serious misdemeanours; while as to the rest of the misdemeanours, it is imperative on him to accept bail.[7] With regard to the

[1] 1 & 2 Ph. & M. c. 13. [2] Selden, arg. 3 St. Tr. 266. [3] 1 W. & M. st. 2, c. 2. [4] R. v Badger, 4 Q. B. 470. [5] 11 & 12 Vic. c. 42, § 21. [6] Ibid. § 23.

[7] The misdemeanours as to which the justice has a discretion are the following:—An assault with intent to commit a felony; an attempt to commit a felony; the obtaining or attempting to obtain money by false pretences; the receiving property stolen or obtained by false pretences, when it is a misdemeanour; perjury and subornation of perjury; concealment of birth by secret burying or otherwise; wilful or indecent exposure of the person; riot; assault in a conspiracy to raise wages; assault on a peace officer in the execution of his duty or on any person acting in his aid; neglect or breach of duty as a peace officer; any misdemeanour for the prosecution of which

misdemeanours last specified, the justice has no option, but is bound to accept bail, if in his opinion the appearance of the accused to take his trial shall be thereby sufficiently insured. And the committing justice may admit to bail at any time between the time of committal and the trial. If, however, the bail are not forthcoming, the committing justices may certify on the back of the warrant of commitment their consent, that bail to an amount specified shall be accepted, in which case any other justice of the same county, borough, or place may take the recognisance, and order the prisoner's discharge by writ of deliverance addressed to the gaoler.[1]

Bail in committal of prisoner by justices.—When all the evidence offered on the part of the prosecution and of the prisoner shall have been heard, and in the opinion of the justice such evidence is sufficient to put the accused on his trial for an indictable offence, or if the evidence given raises a strong or probable presumption of the guilt of the accused, then the justice shall commit the accused for trial to the common gaol, or may admit him to bail.[2]

Main points to be considered in accepting bail.—At this point therefore the mode of dealing with bail comes to be described. The decision of justices in matters of bail is of some nicety, and three things are to be considered: first, the gravity of the crime; second, the weight of the evidence; third, the severity of the punishment. All these points are to be weighed with a view to estimate the probability of the prisoner appearing to take his trial.[3] There are also four dangers expressly guarded against. One is the exacting too heavy bail; another is the denying of bail when it ought to be granted; thirdly, the granting of bail when it ought to be refused; fourthly, the personation of bail. Where justices are bound by law to accept bail, this means reasonable bail; and if they demand excessive bail they do what the Bill of Rights declared to be punishable as a misdemeanour.[4] The party imprisoned is also entitled to an

the costs may be allowed out of the county rate.—11 & 12 Vic. c. 42, § 23.

[1] 11 & 12 Vic. c. 42, §§ 23, 24. [2] Ibid. § 25. [3] Re Robinson, 23 L. J., Q. B. 286; R. v Barronet, 1 E. & B. 1. [4] 1 W. & M. Sess. 2, c. 2.

action against the justices for their exorbitant demand, or an indictment may be sustained against them.[1] If a justice, on the other hand, take bail where he ought not, a criminal information may in some cases be obtained against him.[2]

Examination of sufficiency of bail.—When bail is required, it is usual for two men to enter into the recognisance. The justices may examine them on oath as to the nature and value of their property.[3] Each of the bail ought to be able to answer for the whole sum of the recognisance. The prisoner also is compelled to enter into recognisance for a certain sum; and the sureties each severally for sums of the same total amount. In deciding whether the bail is sufficient, the question of money, or money's worth, rather than character or political opinion, prevails, and to be a housekeeper is usually an essential qualification of bail. And money may be taken in deposit as security. And it is material, whether a bail has been indemnified; or whether he is the defendant's attorney. In order, however, to satisfy the prosecution, the judge or justices may require the prisoner to give twenty-four or forty-eight hours' previous notice, that inquiries might be made as to the sufficiency of the bail.[4] When the bail are accepted they enter into a recognisance, which is a bond, signifying that if the prisoner do not appear at the time appointed, then they shall forfeit the sums specified to the crown. This document need not be signed by the parties, but is merely read over to them.[5]

Relations between bail and the prisoner.—The relation which exists between the prisoner and his bail is that of a friendly imprisonment. He is in the eye of the law their prisoner, and can be reseized at any time and in any place without any warrant or authority other than their own. And he is entirely at their mercy to this extent, that they can, with or without cause, render him up to the custody of the law, from which he was taken, so that they might be discharged of all further responsibility.[6] Not only may the bail reseize their principal on Sunday,

[1] Bac. Ab. Bail; 6 Mod. 179; Hawk. b. ii. c. 15. [2] R. v Clarke, 2 Str. 1216. [3] 2 Hale, P. C. 125; Hawk. b. ii. c. 15. [4] R. v Carlile, 6 C. & P. 628. [5] 2 Hawk. c. 15, § 83. [6] 2 Hale, P. C. 124; 2 Hawk. c. 15, § 3.

but they are entitled to call on the sheriff or any of his officers to assist them in the capture.[1]

The law also regards the relation of the bail towards the prisoner as founded on pure kindness. It is not viewed as an implied contract by the prisoner to reimburse the bail any losses they may incur through his absconding; and hence if he break faith and abscond, the bail will suffer the loss of the money and have no remedy whatever. It is deemed to be against public policy for a prisoner to indemnify his bail, the reason given being, that it tends to reduce the security of all to that of one only.[2]

The terms of the recognisance specify the event on which the liability of bail depends. If it is, that the defendant shall appear and answer an information, and not depart till discharged by the court, then he will be bound to answer any other information substituted for the first.[3] If a day for the appearance is specified in the recognisance, then it is enough if the bail have the defendant ready on that day, unless notice of another day is given.[4]

High Court of Justice accepting bail.—The High Court of Justice, or any judge thereof, has a discretion in all cases to admit to bail persons committed for trial by inferior jurisdictions, and where such jurisdictions have refused to admit bail. But the High Court cannot interfere, where the imprisonment is for contempt or in execution.[5] This power is not confined to any crime, but includes treason and all others.[6] The court, however, is slow to interfere with the decision of the justices of the peace, unless there seems on the depositions a doubt whether a crime has been committed. And though the ill-health of the prisoner is in itself deemed an insufficient ground for bail, yet it is an element in the consideration of the question. And when poverty is suggested, a mode of taking bail in the country may be adopted to avoid expense.[7]

[1] Anon. 6 Mod. 231; Ex p. Lyne, 3 Stark. 132; Horn v Swinford, 1 D. & R. 361. [2] Jones v Orchard, 16 C. B. 614. [3] R. v Ridpath, 10 Mod. 152. [4] R. v Adams, Cas. t. Hardw. 237. [5] 1 & 2 Vic. c. 45; 2 Hale, P. C. 129; 2 Hawk. c. 15, § 47; 1 Leach, 168. [6] R. v Barronet, 1 E. & B. 8. [7] R. v Gregory, 9 Dowl. P. C. 129.

Bail by coroners, constables, &c.—In those cases which arise before the coroner, that is to say, where on the inquiry, the jury return a verdict of manslaughter, the coroner is authorised to accept bail for the appearance of the accused at the next assizes and general gaol delivery, and the person may thereupon be discharged.[1] A constable has, however, in general, no power to take bail from a prisoner; and yet there are a few cases in which he has been specially authorised by statutes to do so. Thus in the metropolitan police district, the night constable in charge of a watchhouse may, in his discretion, take bail from persons charged with a petty misdemeanour. The bail is for the party's appearance on the next day, on which a magistrate sits for the district.[2] And a police constable of a municipal corporation when employed by night at a watchhouse has a similar power.[3]

Bail on indictment found.—Though the usual occasion of bailing a prisoner is in course of the preliminary examination before justices of the peace, yet as it is not incumbent upon a prosecutor first to charge a party before justices, and he may without such charge lay the accusation before a grand jury, it is necessary to state how in this latter alternative the defendant comes to be imprisoned. The course is, that whenever an indictment has been found by the grand jury in any court of oyer and terminer or general gaol delivery, or in any court of quarter sessions, and whether he has previously been bound by recognisance to appear to answer the indictment or not, a certificate of the finding of the indictment is an authority to any justice of the peace of the county, or place where the offence was committed, to issue a warrant of apprehension. When the party is taken under this warrant and identified, he may then be committed for trial or bailed as in the other cases.[4] So when any person is charged with a misdemeanour, which may be prosecuted in the Queen's Bench Division by indictment or information, any judge of the court may issue his warrant to arrest such person, and he shall then be bailed or committed.[5] And a person charged on a coroner's

[1] 22 Vic. c. 33, § 1. [2] 9 Geo. IV. c. 44, § 9. [3] 5 & 6 Will. IV. c. 76, § 79. [4] 11 & 12 Vic. c. 42, § 3. [5] 48 Geo. III. c. 58, § 1.

inquisition, as already stated, may be also arrested under a warrant by the coroner.[1]

How far defendants imprisoned before final decision in summary offences.—It has now been seen to what extent and on what grounds the body of a person charged with debt or crime is imprisoned during the stage of arrest and before trial and final judgment. But what has been stated relates only to actions and suits of a civil nature on the one hand, and indictable offences on the other hand. In order to complete the subject it is still necessary to state how far in those cases of petty offences which are neither entirely civil, nor entirely criminal, and which are tried before justices in a summary way, the person of the defendant is free from arrest or control. The punishment of these petty offences is usually imprisonment of the body, and a few words will suffice to state what is the worst that can befall anyone between the charge and the final decision and punishment in respect of such offences.

In any case where an information is made which may end in a conviction before justices, they are authorised to summon the defendant to attend before them, and if he refuses to obey the summons, or if in the first instance they are satisfied on oath that the defendant will not otherwise attend, they may, as in criminal cases, on oath of a credible witness, issue their warrant to apprehend and detain him.[2] It must, however, be a very important occasion that requires so urgently to be dealt with. The warrant, when issued, resembles the like warrant issued in indictable offences. But the justices are in no case bound to issue this warrant, and may, if the defendant do not appear, proceed to hear the case in his absence.[3] In the hearing of these charges the petty sessions is a public and open court, and the defendant is entitled to appear by solicitor or counsel.[4] If the hearing is adjourned, the defendant may be committed for safe custody till the day of adjournment, or bail may be taken for such appearance.[5] In charges therefore for these petty offences it is entirely discretionary, whether the justices shall insist on the defendant appearing before them. If they do insist, he can be arrested by warrant; but, if they think, as they

[1] See *ante*, p. 169. [2] 11 & 12 Vic. c. 43, § 2. [3] Ibid. § 13.
[4] Ibid. § 12. [5] Ibid. § 13.

usually do, that this is unnecessary, they can proceed in the absence of the defendant. What happens after the decision belongs to the subject of Punishment, in the next chapter.

How far person arrested may be kept in chains.—The extent to which, and the conditions under which, a defendant or prisoner in criminal proceedings can be imprisoned or let out on bail during the course of his preliminary examination have now been stated, and all that remains to be noticed is how the trial itself is conducted. That, however, is a matter of procedure which belongs to the subject of "Judicature," inasmuch as criminal trials do not essentially differ from civil trials in the chief incidents. All that remains to be said in this place is, whether during this preliminary stage, before final sentence and punishment, the person charged can be put or kept in irons, or his person in any way fettered. And the general rule is, that fetters or irons during this preliminary proceeding are altogether illegal, except only so far as they are absolutely necessary for safe custody.[1] Handcuffing and fettering may be said to be one of the common means of preventing prisoners escaping. And the *Mirror* seems to have taken for granted, that gaolers might fetter any prisoners they doubted, if only the fetters weighed no more than twelve ounces.[2] But from the time of Bracton there was a general rule that a prisoner was not to be kept in chains at his trial, though some vagueness existed as to what "trial" meant, and where it began and ended.[3] It was afterwards decided. that the moment a prisoner was arraigned, he could demand to be relieved of his fetters, but that the court would not relieve him till the trial actually began.[4] When Lilburn was imprisoned by the Star Chamber in the Fleet, he lay in irons and was almost starved, so that his friends had to bribe the officers to put meat for him through a hole in the wall.[5] But he was sufficiently well advised to know and to demand at his trial, that he should be set free so long as he behaved himself civilly and peaceably.[6] Coke and Hale, following the *Mirror* and Britton, also laid down the law, that during

[1] 3 Inst. 34, 35: 2 Inst. 381. [2] Mirror, c. 2, § 9. [3] 4 Bl. Com. c. 25. [4] Waite's Case, Leach, 36; 1 East, P. C. c. 16, § 17. [5] 3 St. Tr. 1351. [6] 4 St. Tr. 1303.

arraignment the prisoner ought not to be in irons.[1] And Holt, C. J., seemed to have the same view.[2] So long therefore as irons are used only to prevent escape or keep unruly prisoners quiet, it must be an unobjectionable mode of keeping order in all times and countries. And during an argument in the Queen's Bench before Lord Mansfield in 1765, three convicted highwaymen had to be kept chained together for the safety of all bystanders.[3]

During arrest and trial no risk beyond imprisonment for safe custody.—In all possible cases of trial, therefore, whether in civil or criminal matters, between the commencement of the action or charge, to the final judgment, the worst that can happen to the defendant or the party charged is, that he may be imprisoned while the charge is being investigated, and that can only happen in criminal cases, or where in civil cases he was about to abscond. During this period the party charged incurs no punishment, risk, or confinement whatever, except solely for the purpose of safe custody. In all other respects, he is free, and is allowed to communicate with friends and advisers. He runs no risk of losing his life by the very process of trial, or during the inquiry into the truth of the accusation against him. And this, which is the modern method of dealing with prisoners and defendants, seems so evidently just and fair, that one can scarcely believe that at any period of history, or in any civilised country, any other course could have been possible. But this is a conclusion which is far from being historically true. Our ancestors, following the usages of nearly all surrounding nations, known and unknown at that period, resorted to the most fantastic methods of trial, and the most unreliable modes of discovering truth, and of fixing guilt or innocence. And though the very notion of such obsolete practices is abhorrent to the civilised mind, it will be wholesome to recur for a little to a consideration of them.

[1] 1 Hale, 212; 3 Inst. 35; Mirr. c. 5; Brit. c. 5. [2] 13 St. Tr. 221.

[3] R. v Rogers, 3 Burr. 1812. In cases of treason the ancient Greek pleaded in chains with a keeper on each side.—*Xen. Hell.* i. c. 7. The Roman law took care to prevent accused persons from being harshly treated in prison; and to provide for their cases being heard within a month, and in no case longer than a year and a day. —*Cod. Theod.* lib. 9, tit. 3, cc. 1, 7.

especially as they throw light on some points still existing, and which have or ought to have no firmer hold on us than the ordeals and battles which once were taken as models of fair play between litigants, and between the wrong-doer and the sufferer.

Trials by ordeal, battle, wager, and torture.—These obsolete and fantastic modes of trial and means of evidence, for they were nothing else, may be briefly noticed under three heads. First, there once was trial by ordeal; secondly, trial by battle; thirdly, trial by wager of law; fourthly, evidence by torture.

Trials by ordeal.—The trial by ordeal seems to have been utterly unknown in China, and is not found in the Koran, though the Institutes of Menu refer to it as always used in India; and in nearly all European nations it was the common mode of trial, for many early centuries of the Christian era.[1]

The learned have disputed, whether the forms of ordeal practised by barbarous nations since the Christian era were inherited from their pagan ancestors, or were invented by the clergy to enhance their own authority. It seems, however, that the clergy only adapted these convenient methods. The earliest codes allude to ordeal as an existing institution, such as the Senchus Mor, or Irish code, compiled for the Brehons at the request of St. Patrick; also the Salique law.[2] The Britons, like most other European tribes, adopted it, and in the year 1000 the Saxons and Welsh agreed, that it should be the standard mode of settling disputes between individuals.[3] Among the Anglo-Saxons the dooms at the beginning of the tenth century show it was then a settled custom.[4]

There were various forms of ordeal in common use

[1] It is also found in Japan, Java, and Malacca, and Siam. The Hebrews had the bitter water as a test of conjugal infidelity.—*Numb.* v. 11-31. And a mode of determining criminals by lot, as in the case of Achan and Jonathan.—*Josh.* vii. 16-18; 1 *Sam.* xiv. 41, 42. Many tribes of savages have divinations and mysteries of similar import kept in hand by sorcerers, who come to conclusions as to guilt and innocence on equally sound data. The Greek and Roman divinations by oracles and omens were evidently of kindred origin.

[2] Senchus Mor, i. 195; Pardessus, First Text, tit. 53, 56.

[3] Senatus Consult. de Mont. Walliæ, c. 2. [4] Anct. Laws of England.

among European nations, such as boiling water, red-hot iron, swallowing bread and cheese, the eucharist, the cross, the lot, and touching the body of the murdered person.

The ordeal of boiling water consisted in the accused thrusting his naked hand to the bottom of a cauldron of boiling water and finding a ring or small stone. But there were many degrees of depth of this cauldron. Fasting and prayer were enjoined by the Church for three days previous, and prayers were used by the attending priests. Mass was celebrated, and the accused was required to partake of the sacrament. After the arm had been withdrawn, it was bound with a cloth and sealed by the judge, and after three days was unwrapped and examined, when its condition was believed to show conclusively the innocence or guilt.[1] The ordeal which was the standard form in use throughout all Europe of red-hot iron, consisted in the accused walking blindfolded among six to twelve ploughshares, made red-hot, or by carrying a red-hot piece of iron of a specified size for a distance of nine feet.[2] And King Edward the Confessor put his mother to this test.[3] The cold water ordeal consisted in lowering the accused, bound with cords, into a reservoir or pond with a rope. If he had been guilty of a false oath, the assumption was that he would float, because water would not receive anything so impure; whereas if he was innocent, he would sink, and then escape by the rope. This ordeal, which was supposed to have been devised in the ninth century, became prevalent throughout Europe, and was deemed equally satisfactory as the others, though in course of time it was observed that while the hot iron and the duel were more aristocratic, the hot and cold water ordeal were more plebeian.[4] The ordeal of the cross was practised in the eighth century, which consisted in a trial of endurance in standing with uplifted arms before the cross, and this was encouraged by Charlemagne as a mode of settling disputes of property, and was thought very effective in cases of perjury.[5] But the Empress Lothair, in the ninth century, abolished it, as tending to bring the Christian symbol into contempt.[6]

[1] Thorpe's Anct. Laws, i. 226. [2] Anct. Laws of England, Athelst. iv. 7. [3] 1 Mallet, North. Antiq. 192. [4] Glanv. b. xiv. c. 1. [5] Ducange, Crucis Judicium.

[6] Leg. Longobard. lib. 2, tit. 2, § 32. Though this ordeal never

Another ordeal was the *judicium offæ panis conjuratio*, that of the consecrated bread and cheese, called by the Anglo-Saxons the *corsnaid*, which consisted in swallowing about an ounce of barley bread or cheese over which prayers and adjurations had been said, and after the communion had been received. If the accused could swallow the morsel with ease, he was innocent; but if otherwise, he was guilty. This ordeal prevailed in England before the Conquest;[1] and in other countries for some centuries later. And in the ancient law of India the same ordeal with rice was practised.[2] Closely resembling the corsnaid was the ordeal of the eucharist, which consisted in taking the consecrated wafer, the common belief in the early Christian centuries being, that if the person was guilty, he would be seized with convulsions or be overtaken with speedy death. It was used by the clergy among the Anglo-Saxons.[3] But in the eleventh century the Popes discountenanced it as a degradation of sacred things. The ordeal of casting lots, also used in India, was in use in Pagan times, and is mentioned in the Anglo-Saxon laws.[4] But the other ordeals practised by Christians soon superseded it in Europe, and the Councils condemned it as mere paganism.

Amid the competing forms of ordeal, though sometimes the accused had an option allowed him, yet one or other was to all intents and purposes a trial of guilt or innocence, of right or no right. The favourite maxim in those times, as it is among the Kaffirs at this day, seems to have been, that when a person was accused, it was not the prosecutor's duty to prove the guilt, but the prisoner's duty to disprove it; and he was thrown into prison till, by means of some ordeal, he vindicated his innocence.[5] These ordeals, absurd as they may appear to modern eyes, were all accepted as conclusive of the point in issue. Yet at the same time it was allowed for an accused person to buy himself off by a composition or fine, as the Anglo-Saxon

acquired an extensive hold of society, it has left its mark in the phrase current to this day of *experimentum crucis*.

[1] Ethelred, tit. 9, § 22; Cnut, Eccles. tit. 5. [2] Ayeen Akbery, ii. 498. As to Pegu, the same, 8 Pink. Voy. 428. [3] Ethelred, x. § 20; Cnut, Eccl. tit. 5. [4] Egbert, Excerp. c. 84. [5] Cnut, Sec. c. 35; Hen. I. c. 61, § 5.

as well as the Salique laws show.[1] But this last qualification was obviously only following up a still older rule applicable to all crimes whatsoever.

The ordeal came latterly to be abused not only as another form of torture, but as a means of extortion to the clergy who administered it. The Popes of the twelfth century forbade it, and in England in the thirteenth century it was generally abandoned.[2] And in other European countries the same course was followed.[3]

Trial by battle.—The wager of battle is justly said to have been a small advance on the natural right of man to use his strength as the measure of his rights. The moment he concedes that there should be a fair and equal-handed fight, he renounces the selfish instincts of brutal tyranny, and concedes something, however small, to the sense of equality and a glimmering sentiment of justice, or a lurking suspicion that he may be in the wrong. The theory of the wager of battle or judicial duel, was also based on the same assumption as ordeal, namely, that with equal chances the deity would interpose and give the victory to him whose quarrel was just.[4] Some authors

[1] Æthelstan I. cap. 21; First Text, Pardessus, tit. 53. [2] Spelman Gloss. Judicium; Math. Westm. A. D. 1250; Bracton, 1 Rym. Foed. P. I. 154.

[3] Lea's Superstition, 274. In Thibet it is said the plaintiff and defendant both thrust their hands into a cauldron of boiling water containing a black and white stone, and he who obtained the white stone succeeded in the cause.—*Duclos, Mem. sur les Epreuves.* In Sierra Leone the accused was made to drink the juice of a tree; and according as it operated as a purgative or emetic, he was guilty or not guilty.—*Winterbottom's Sierra Leone.* In Guinea, a cock's feather was greased and pulled through a hole made in the tongue, and if it passed easily, the accused was innocent.—16 *Pink. Voy.* 529. In Loango and Hondo the accused used to drink a poison, and if he vomited, his innocence was clear.—7 *Univ. Mod. Hist.* 31. In Benin, Africa, a juice was injected into the eye, or a hot copper rolled over the tongue, and if no inflammation followed, there was no guilt.—6 *Univ. Mod. Hist.* 583. In India they weighed a person before and after certain ceremonies, or immersed the accused till a person ran for an arrow shot from a bow and brought it back.—*Wilson Dict.*

[4] Brennus, king of the Gauls, told the Romans, that the most ancient of all laws was, that the weak must give way to the strong; and that this was a divine law, and even the brutes obeyed it. And another of the same race of kings told Marius, that providence was always on the side of the strongest and bravest.—7 *Univ. Hist.* 370; *Tacit.* b. iv. c. 17.

have attempted to show, that the judicial duel is characteristic of certain nations only: while others maintain it is as old as the human race, and that Cain and Abel were the first examples of it. But all admit that, if not a universal mode of solving disputes at an early stage of civilisation, there is scarcely a nation having any records which do not allude to its existence.[1] Hence unnecessary pains has often been taken to trace its existence or non-existence among particular tribes and people; and to speculate upon the reasons why one historian or another fails to notice it.[2] Though it is little noticed in the Salique law, yet the offshoots of that law and the Lombardian laws, the laws of the Angles, the Saxons and the Frisians abound in provisions relating to the judicial duel.[3] The Welsh code, revised by Hoel Dha in 914, admits it, yet it is noticed as singular, that the Anglo-Saxon and Anglo-Danish codes do not allude to it; and it is generally stated, that the wager of battle was introduced into England by William the Conqueror.[4] The Gothic races, like the Anglo-Saxons, had no place for such a remedy, but this is

[1] Lea's Superstition, 78. [2] Ibid. 80.

[3] The Burgundians introduced the practice of judicial combats into Gaul, their legislator, Gundobald, saying, that the judgment of God directed the issue of each combat. This practice, absurd and cruel as it was, which had been peculiar to the Germans, was propagated and established in all the monarchies of Europe, from Sicily to the Baltic. It applied to civil and criminal proceedings, and involved witnesses as well as parties. It was not totally extinguished at the end of ten centuries.—*Gibbon, Rom. Emp.* c. 38. The Salic law obliged the accuser to prove his charge, and allowed no negative proofs; but the Ripuarians and Franks allowed negative proofs. Hence the Salic law did not allow trial by combat, which those others admitted as a consequence of negative proof.—*Montesq.* b. xxviii. c. 13. The Burgundians allowed trial by battle, because others were not to be trusted.—*Leg. Burg.* c. 45. If the judge found one of the parties had magic herbs about him, he ordered them to be taken from him.—*Montesq.* b. xxviii. c. 22. To make a champion more diligent, his hand was cut off if he lost a battle.—*Beaum.* c. 61. At one time it was a law of the Bavarians and Burgundians, that the accused could challenge a witness for the accuser to single combat, and this decided the point.—*Montesq.* b. xxviii. c. 26. One explanation has been offered, namely, that as the judge who was appointed by the feudal lord of one of the parties was usually known to be in favour of one of the parties, the other preferred to fight it out.—*Barringt. Stat.* 227.

[4] Thorpe's Laws.

attributed to the paramount influence of the Roman civilisation.[1]

In the early middle ages the judicial duel was to some extent only a reaction against the senseless perjuries of the wager of law or compurgation, and Charlemagne and Otho II. urged the former as preferable on this account.[2] In the English law of the thirteenth century the judicial duel was allowed chiefly in doubtful cases. And it was not compulsory where the party was maimed or had lost his front teeth, for Bracton observes that the teeth are exceedingly useful for fighting.[3] It was allowed only in treason, felony, and crimes of importance, but was forbidden in trifling misdemeanours.[4] A thief, for example, could fight it out with the warrantor, if the latter denied that the goods had been sold or given to him as a present. And it was even doubtful whether a party found guilty could not challenge the judge himself to mortal combat, as a means of appeal.[5] Such were the perils of seeking and obtaining justice in those days. In course of time it was confessed, that wager of battle was not quite suited to the case of parties who were physically incapable of fighting, or to ecclesiastics, or women; and therefore the mode of meeting this difficulty was by allowing these to hire a champion; and if they were too poor, the lord was to do so at his expense. It is true, that in Germany it was at one time attempted, in case of a woman being a party, to equalise the conditions by burying the man up to his waist, tying one hand, and giving him a mace in the other, while the woman took her law out of him with a large stone tied in a bag, to be wielded at her discretion.[1] As regarded the clergy, their exemption from the judicial duel was rather forced on them by emperors, and bishops, and popes than demanded by themselves, for members of the Church militant were as eager as the laymen to hold their own; but at last they were compelled at the risk of deposition

1 Lea's Superstition, 83. Trial by battle was introduced into England by the Normans and was disliked.—1 *Stubbs' Const. H.* 276, 616.

2 Capit. Car. Mag. ex lege Longob. c. 34; Leg. Longob. lib. ii. tit. 55; Leg. Fris. tit. 14, § 4. 3 Bract. lib. iii. tr. 2, c. 18, 23, 24.

4 Ibid. c. 3, 19, 23; Glanv. lib. xiv. c. 1. 5 Bract. b. viii. c. 9. Lea's Superstition, 105.

to subdue their warlike instincts. The Council of Lateran in 1215 ratified previous canons and decrees tending to this result.[1]

Conditions of wager of battle.—One of the essential conditions of the wager of battle was the oath of each party as to the justice of his cause, and this oath was administered to each. Whoever was the loser was thus guilty of perjury, and on that account was further punished in England by a fine.[2] In other countries the loss of a hand, or punishment by the *lex talionis* was added.[3] The *Mirror* is also careful to notice, that the plaintiff on going into action came from the east and the defendant from the west, and each swore he had no charms about him.[4] And as wager of battle was to a great extent founded on fair play, it was inevitable that some rules should be laid down as to the choice of weapons. It seems that at first the appellant had the choice of weapons, and he sometimes abused this right by choosing expensive ones. By degrees some equality was established. When champions were hired, they fought only with clubs and bucklers of a fixed size. When the parties fought in person, the choice of weapons was taken from the appellant, and given to the defendant. In other countries each chose his own weapon, as in Russia, but some chose so foolishly and fatally to themselves that this practice was abolished on that account.[5] And though hired champions were soon allowed as representatives of parties who were physically incapacitated, as well as of women and clergy, it was not generally conceded to parties who were able-bodied. The practice no doubt grew; and in England before the statute of Edward I.[6] a champion was allowed in a suit concerning real estate if he had been an eye-witness of some material fact.[7] The champion incurred great risks, for when he was defeated, he incurred the penalties of perjury, and was liable to be hanged or to lose a hand or a foot according to the nature of the suit.[8] This employment of champions, however, again led to further evils, for their profession came to be deemed infamous; and they were,

[1] Concil. Lateran. iv. can. 18. [2] 1 Thorpe's Anct. Laws, 493; Bract. lib. iii. tr. 2 cc. 18, 21. [3] Lea's Superstition, 115. [4] Mirror, c. 3. [5] Lea's Superstition, 118. [6] 1 Westm. 1275. [7] Bract. lib. iii. tr. 2, c. 32; Glanv. lib. ii. c. 3. [8] Lea's Superstition, 123

like Roman gladiators, incapable of being witnesses or of succeeding to property. In England the practice of hiring champions was discouraged, at least in criminal cases; and when a party was unable to wage battle, his case was remitted for trial by a jury.[1] In other countries the champions were not only allowed, but regularly licensed by the state. And as regards the Church, one was regularly employed at a salary, with premiums for contingencies. And this office was often sought after eagerly, as it was found capable of being made highly lucrative.

Decline of practice of waging battle.—The wager of battle, after long satisfying the sense of justice as a remedy, at length began to be discredited. The burghers of mediæval towns felt it a grievance; the Church also maintained its hostility, and finally the spread of the Roman jurisprudence throughout the feudal governments of Europe in the thirteenth century completed its disgrace. The Emperor Frederick in his Neapolitan code, in 1231, and the German code and code of Castile and Arragon, denounced it as inconsistent with justice, as nothing but a kind of divination, or tempting of God, and as a punishment rather than a trial.[2] About 1248 St. Louis of France ordered trial by battle to be discontinued, and trial by testimony to be substituted.[3] The last judicial duel in France occurred in 1547.[4] In Scotland by a statute of 1400 it was prohibited except in capital crimes secretly committed, and where witnesses were wanting.[5] And William the Lion granted to the burgesses of Inverness exemption from the practice.[6] In England it was not till 1571 that the judicial duel was abolished in civil cases, and then it was deemed a bold step to do so.[7] Even Coke seemed to think it was a divinely appointed ordinance, and alludes to the precedent of David and Goliath.[8] A statute of 41 Elizabeth, c. 3, was passed to regulate some niceties in the criminal practice.[9] Staundford, writing in 1557, alluded to it as if it were the same thing as leaving the decision to

[1] Glanv. lib. ii. c. 3; Bract. lib. iii. tr. 2, cc. 18, 21. [2] Lea's Superstition, 153. [3] 3 Guizot, Civ. Fr. lect. 14. [4] Lea, 168. [5] Stat. Rob. III. c. 3. [6] Innes, Scot. Mid. Ag. 166. [7] Spelman, Gloss. 103. [8] 3 Inst. 158. [9] Dyer, in the time of Elizabeth, says a crowd of 4,000 people would collect to witness a trial by battle.

God, to whom all things were open.[1] And Hale cautiously spoke of the trial by combat as unusual in his day.[2]

In 1818 a girl named Ashford was supposed to have been murdered by one Thornton, who however was acquitted by a jury. A brother of the girl then appealed the murder, and after an elaborate argument was found by Lord Ellenborough and the other judges entitled to this as the usual and constitutional mode of trial. The appellant afterwards withdrew, and saved the court and a curious crowd the necessity of witnessing the bloody arbitrament. A similar case occurred in Ireland. It was thus time for the legislature to interfere and repeal this mediæval barbarism, and though Holt, C. J., and Dunning had described it to be a pillar of the constitution, a statute was passed to abolish it entirely.[3]

Trial by wager of law.—The Anglo-Saxon codes after the seventh century all assumed compurgation to be one settled mode of defence against crime. The clergy first succeeded in gaining the right to have compurgators of their own class, and next to be exempt altogether from the necessity of an oath, at least in unimportant cases.[4] And this continued to be the practice in Wales till the fifteenth century.[5] Trial by compurgators consisted in the accused taking a solemn oath and finding sufficient numbers of witnesses to take also another solemn oath, that he was innocent. This oath was general in its language and was not an oath of belief of absolute certainty as to the fact.[6] The Salique law specified twenty-five compurgators on each side.[7] The Scotch law of the twelfth century specifies ten to twelve of his peers as sufficient in most cases.[8] Oaths also had a numerical value according to the rank of the swearer, that of a thane being equal to those of seven yeomen.[9] The character of the compurgators came next to be scrutinised. And a singular mode of eking out the testimony which prevailed among the Anglo-Saxons was the *juramentum supermortuum*, which consisted in the

[1] Staundf. P. C. c. 15. [2] 2 Hale P. C. c. 29. [3] 59 Geo. III. c. 46; 3 Camp. C. J. 169. [4] Lea on Superstition. [5] Spelman, Gloss. Assath. [6] Anct. Laws of England; Ethelred, i. 1; King Cnut, Sec. 30. [7] First Text of Pardessus, tit. xlii. 5. [8] Quon. Attach. cc. xxiv. lxxv.; Leg. Burgor. c. xxiv. [9] Leg. Cnuti, c. 127; Leg. Hen. I. tit. 64, 76.

compurgators going to and swearing on the tomb of the defendant or some important witness who had died, as to what the dead man would himself have sworn if alive.[1] This practice also prevailed in Southern Germany so late as the thirteenth century.[2]

There seems no clear account of the precise mode of dealing with the compurgatory testimony. All it amounted to seemed to be merely a solemn asseveration of belief in the truthfulness of the accused. The oldest oath extant is said to be in an Anglo-Saxon formulary, dated about A.D. 900: "By the Lord the oath is clear and unperjured which N. has sworn."[3] The Lombardian oath, of about a century later, was "That which the accused has sworn is true, so help me God." And the Norman oath of the sixteenth century was substantially the same.[4] Innocent III., about the commencement of the thirteenth century, altered the oath so as to make it imply not an absolute guarantee of the truth of the defendant's statement, but merely a belief in his veracity; and indeed he was said to have desired to abolish the practice altogether.[5] And the Inquisition acted on the doctrine, that the accused was guilty unless he could find compurgators to rebut the presumption.[6] The accuser also was obliged in many cases to have compurgators to support his veracity; and in accusations against the clergy he required a large number, according to the grade of the accused.[7] And the Anglo-Saxon code of Edward the Confessor required this in nearly all cases.[8]

Such a system as that of compurgators and the inevitable perjuries which it entailed, was denounced by Hincmar in the ninth century.[9] In England the same evil is alluded to in the laws of Henry I.[10] And though Glanville and Bracton give little importance to it, and allude to it as only used in minor and rare cases,[11] it was not finally and formally abolished in England till the nineteenth century,

[1] Dooms of Ine, c. 53; Leg. Eccl. Hoel Dha c. 27. [2] Jur. Prov. Alam. cap. 7, § 3. [3] Thorpe's Anc. Laws, i. 180. [4] Lea's Superstition, 43. [5] Can. xiii. extra. v. 34; Can. xv. [6] Du Cange (Purgatio). [7] Capit. Car. Mag. vi. (A. D. 806) c. 23. [8] Leg. Will. I. c. 14; Leg. Hen. I. tit. 64; lib. 66. [9] Hincmari, Epist. 34. [10] Leg. Hen. I. c. 64, § 1. [11] Glanv. lib. i. c. 9, c. 16; lib. ix. c. 1; lib. x.; Bract. lib. iii. tr. 3. c. 37; lib. v. tr. 5, c. 13.

though it had long been disused. In the sixteenth century the practice is described without reprobation, and in the seventeenth century it was still in force, though admitted to be liable to abuse.[1] In 1824 [2] the court, without repudiating this style of trial, discouraged an attempt made to bring compurgators into court. And in 1833 the wager of law was finally abrogated by statute.[3] Nearly all the other European nations had abandoned it before England had done so.

Torture as a means of evidence.—Torture was at one time part of the judicial system of nearly every country in Europe.[4] It had thus extensive support in its time, and its lineage mounts up also to the ancients. It seems to have been unknown in India, Egypt, and the Mosaic law, but it appeared in China and Japan.[5]

Practice of the ancients as to torture.—In ancient Greece torture was a well-understood practice. It could not indeed be used upon freemen, except by special decree of the people.[6] But in the case of slaves, their evidence was inadmissible unless given under torture; and when so given, it was deemed most cogent and convincing.[7] Indeed Isæus recommends it as the best kind of evidence.[8] The usual course was for both parties to offer their slaves for torture; and in formal suits the depreciation suffered by the opponent's slaves in the process formed part of the costs paid by the losing party.[9]

In the earlier Roman laws the torture was confined, as in Greece, to slaves. But in course of time the emperors

[1] Termes de la ley; Styles, 572. [2] R. *v* Williams, 2 B. & C 528. [3] 3 & 4 Will. IV. c. 42, § 13. [4] 30 St. Tr. 545, 829.

[5] By the Chinese code torture was not allowed in judicial investigations to be used on eight privileged classes.—*Staunton, Code.* 6, 441; 2 *Du Halde*, 62. But in other cases it was used to force a confession, and indeed anyone could get a free pardon on confessing.—*Ibid.* In Japan it was said that the criminal kneeled, with his hands tied, and a constable struck him with a stick till he made satisfactory answers.—1 *Perry's Japan*, 494.

[6] Valer. Max. lib. iii. c. 3. [7] Antiph. Tetral. i. 633. [8] W. Jones, Isæus.

[9] The principal modes of torturing Greek slaves were the wheel, the rack, the comb with sharp teeth, doubling them up in the low vault, the burning tiles, the hogskin whip, and the injection of vinegar into the nostrils.—*Eschbach's Él'tude du Droit*, § 268.

used it freely on the citizens.[1] The tyrants Tiberius, Caligula, and Claudius derived undisguised delight from witnessing its application.[2] Nero and his successors used it largely on the Christians.[3] Not only did the Roman law allow parties to be tortured, but also the witnesses. If they were slaves, this was a matter of course; but freemen also were served in the same way, if unknown or suspected.[4] Indeed the torture of slaves was deemed with them, as with the Greeks, the most efficacious means of discovering truth.[5] Slaves were liable to torture in civil as well as criminal proceedings,[6] an exception being, that a slave was not to be tortured to give evidence against his master or the master's parents, except in grave cases.[7]

Practice of torture during Christian centuries.—The European barbarian codes, with one or two exceptions, contained no trace of the practice of torture, probably, it has been thought, because each family or tribe avenged the crimes committed upon any of the members, there being no definite distinction between civil and criminal wrongs.[8] The Gauls in Cæsar's time allowed the wives and slaves to be tortured, if any foul play was supposed to have occurred at the master's death.[9] The Burgundian code allowed slaves to be tortured, subject to compensation to the owner of the slave, when the latter was injured.[10]

[1] Sueton. August. 23. [2] Sueton. Tiberius, c. 62; Calig. c. 32, Claud.

[3] Tacit. Ann. 15, 45; Lactant. de mortib. persecut. By degrees exceptions and privileges were recognised in favour of soldiers, patricians, the higher public officials, and priests.—*Const. Cod.* 8, 9, 41; 11, 9, 41; 16, 9, 41; 8, 1, 3. All courts used it as a matter of course in treason; but in other cases the order of the emperor was sufficient justification for its application, and it was used in cases of poison, adultery, and magic. One check to it consisted in this, that if the accuser failed to make out his case, the same tortures were retaliated upon him.—*Ibid.* 10, 9, 46; 17, 9, 2; 3, 9, 8.

[4] Novell. xc. 1, 1. [5] Dig. viii. 48, 18. [6] Ibid. ix. 1, 48.

[7] Dig. i. 14, 48; Cod. 1, 9, 41. The age at which a person became liable to the torture was fourteen.—*Dig.*, xvi. 1, 48, 18. The weight of the evidence obtained by torture was variously estimated by the Roman lawyers, and the utmost that can be said of it was, that it was admissible evidence. The ordinary means of torture were the rack, the scourge, fire, and hooks for tearing the flesh.

[8] Lea's Superstition, 302. [9] Cæsar, vi. 19. [10] Leg. Burgund. tit. 7.

But when the Roman law began to be studied throughout Europe, the efficacy of torture as a means of discovering crime became irresistibly clear to the barbarians, who were just beginning to be dissatisfied with their ordeals and wagers of law and of battle. In the thirteenth century France, and somewhat later Germany, seem to have introduced torture into their law.[1] Italy also did the same. In 1252 Innocent IV. issued his instructions for the guidance of the Inquisition in Tuscany and Lombardy; and ordered the civil magistrates to extort from all heretics by torture, not only a confession of their own guilt, but an accusation of all their accomplices, and he referred to the practice in the case of thieves and robbers.[2] In the fourteenth century those countries were fully possessed of the art of torture, in all cases where the accused denied the charge.[3] In Hungary, Poland, and Russia the practice was introduced more than a century later.[4] The practice of the Inquisition was to assume the guilt of the suspected person, to prevent him knowing beforehand the charge against him, to carry on the inquiry in secret, and to torture the accused till he confessed. This was an inversion of the Roman practice, which required the accuser to prove his case, and if he failed, then to undergo the same punishment himself. Most of the European nations followed the practice of the Inquisition, thereby aggravating the horrors and injustice of the procedure.[5] Not only was the accused tortured till he confessed, but after conviction he was again subjected to torture in order to discover the accomplices, and if possible identify them. This was also contrary to the Roman law, which confined the torture to the crimes of the individual.[6] The ablest jurists of France, when revising the law in 1670, decided that justice required trials to be in secret, without notice and without the aid of counsel—the torture to be reserved for capital cases, when the proof of guilt was not very strong; and that after torture the party should still be liable to have further proof brought against him, and to be tortured again in

[1] Du Boys, Droit Crim. ii. 405. [2] Innocent IV. Leg. et Const. contra Hæret. § 26. [3] Du Boys, Droit Crim. ii. 48. [4] Ibid. i.; Lea's Superstition, 346. [5] Ibid. 348. [6] Const. 17 Cod. ix. 2.

order to discover accomplices.[1] And this remained the law for a century later.

It would be idle to enumerate the various forms of cruelty, which torture assumed: man's inhumanity to man being unsearchable and infinite. Antiquaries may find the details recorded, and no less than 600 different instruments mentioned.[2] As a German author observed after a careful review of the practice in his time, Satan himself would be unable to increase its refinements of cruelty.[3] In China strips of skin were cut off, and gashes made as each incident of evidence was developed.[4]

Torture in early English law.—In the ancient Anglo-Saxon codes no place is given to torture, as the wager of law and ordeal then fully satisfied everybody's sense of justice. Nor does Glanville or Bracton mention it. Trial by jury also created a habit adverse to all notions of torture. Fortescue professed, that the practice of torture in his time was repugnant to the common law, though he impliedly admits its existence.[5] And Coke ostentatiously quoted Fortescue, and said "there was no law to warrant tortures, nor could they be justified by any

[1] Nicolas sur la Torture, 111 (ed. 1682). [2] Grupen, Obs. de Appl. Torment. 1754. [3] Rosbach, Tort. 13.

[4] 3 Univ. Mod. Hist. 590. In Germany the Emperor Charles V. had reduced torture to a system, in the Caroline Constitutions. Notwithstanding a variety of specious safeguards, the result was mainly to leave the use of torture to the discretion of the judge; and a lawyer writing in the middle of the seventeenth century, described the judges as acting on the theory that nature had created the bodies of prisoners for them to lacerate at will.—*Rosbach Proc. Crim.* tit. v. c. 9, No. 10; *Lea, Superstition*, 357. By the laws of Castile, after the prosecutor found his evidence insufficient, he would petition the court for the application of torture, though it was also laid down that there must be reasonable evidence of guilt to justify the application.—30 *St. Tr.* 545, 829. By the law of Spain, persons suspected of murder, robbery, rape, and certain other crimes, or of being accomplices, and also prevaricating witnesses, were liable to torture, but five days' notice of it was given, and it lasted only one hour at a time, and a defensor was appointed for those under twenty-five. —*Ibid.* 865. The judge decided the species of torture to be used.—*Ibid.* 843. In the Scandinavian codes generally, torture had no place; this was owing to the use of a jury, which admitted of open trial and the accused was allowed to clear himself by sacramental purgation.—*Lea, Superstition*, 374.

[5] Fortesc. De Laud. c. 22.

prescription, being so lately brought in." Coke also further insists that Magna Charta, c. 29, which forbids freemen being put to death except by legal sentence, impliedly prohibited it.[1] And he says it was contrary to the law of God; yet it was one of the privileges of the nobility to be exempt from torture.[2] And Sir Thomas Smith in his Commonwealth also treated it as unknown in England, though the custom in other countries. He, with much vanity and want of logic, boasted it was too servile, for that the English cared little for death, but would confess to have done anything rather than suffer torment.[3] In the reign of Henry VIII. an ingenious engine of torture was invented by a lieutenant in the Tower, of the name of Skevington, and which was soon aptly called the Scavenger's Daughter, as it gradually squeezed the blood out of the hands, and feet, and nose, and mouth.[4] The manacles were also an instrument kept at Bridewell for the purpose. The registers of the Privy Council from Henry VIII. to Charles I., contain numerous entries of warrants for the application of the rack, even in accusation of robbers, horse-stealing, murder, libel, treasonable speeches, as well as ecclesiastical crimes, though at the last date it was usually confined to the case of high treason.[5] The legality of the practice was certainly considered doubtful at that age. When Felton was examined by the council in 1628, as to whether, in stabbing the Duke of Buckingham, the Puritans had set him on to do it, and Laud threatened to put him to the rack, the prisoner retorted with great force, that if it must be so, he could not tell which of their lordships, he might nominate in the extremity of torture, for torture might

[1] 3 Inst. 35. [2] 12 Rep. 94.

[3] Smith, Commonw. b. ii. c. 27. Sir T. Smith himself assisted at the rack ten years after he had laid down the law so clearly.—*Jardine on Torture*, 25.

[4] 27 Hen. VIII. c. 4, recital; Com. Journ. 14 May, 1604; Tanner's Soc. Europ. 18.

[5] Jardine on Torture, 15-23. "The rack seldom stood idle in the Tower during all the latter part of the reign of Elizabeth, though she ordered it to be disused."—1 *Hallam, C. H.* 148, 151; *Lingard, Hist.* n. U. Lord Burghley was said to have justified it, because it was never used to wring out confessions at random, nor unless the party had first refused to declare the truth at the queen's commandment.—1 *Somers' Tracts*, 89.

draw unexpected things from him. The council being staggered, and the king suggesting that the opinion of the judges should be taken, whether it was legal to put an accused person to the rack, and whether there was any law against it, all the judges are said to have consulted together and replied, that no such punishment was known or allowed by our law.[1]

The warrants from the council were directed usually to the law officers of the crown to carry out the examination, and both Coke and Bacon are mentioned in some of them; those great authorities both signed a warrant in 1619 to put one Peacock to the rack, as he deserved it, as well as Peacham.[2] James I. authorised commissioners to examine Guy Fawkes on the rack, using the gentler tortures first;[3] and many witnesses to the Gunpowder Plot gave their evidence under this stimulus.[4] It is said that the last instance recorded in England of torturing an accused person, was that of a glover named Archer, who was racked in 1640, to make him confess his companions in some tumultuous attack on Archbishop Laud's palace at Lambeth.[5]

The practice of torture had been denounced by Montaigne and Beccaria, and other writers less known in the seventeenth century. At last the legislatures of Europe a century after began to think it time to abolish it.[6] The

[1] Rushw. Coll. vol. i. p. 638. [2] Jardine on Torture, 51.
[3] Ibid. 47.
[4] Abbott's Antilogia, c. 1. Under James I., Peacham, a country clergyman, accused of treason in a written sermon found in his study, was examined before torture, in torture, between torture, and after torture.—2 *St. Tr.* 869.
[5] Jardine on Torture, 58. In Scotland, though torture was introduced late, it was resorted to unsparingly, in cases of witchcraft.—1 *Lecky*, *Ration.*; *Pitcairn*, *Crim. Trs.*; *Dalrymple Mem.* P. 2, p. 128; *Barringt. Stat.* 496. And it was not abolished till the union.—7 Anne, c. 21.
[6] By a decree of 1780, followed by a law of 1789, it was formally abolished in France.—*Merlin*, *Rep. de Jur.* tit. Question. The Empress Catherine had advised the same course, and it was finally abolished in Russian law by an imperial ukas in 1821.—*Storch. Annal.* vol. vi. p. 417. It was not got rid of in the majority of the German states until early in the nineteenth century.—*Mittermaier*, *Deutsche Strafverf.* vol. i. p. 344; *Du Boys*, *Dr. Crim.* i. 620. But Frederick the Great abolished it in Prussia in 1730 for all cases except treason.—*Carlyle*, *Fred.* b. xi. c. 1.

fatal objection to torture as a means of extracting the truth from accused persons is, that it is altogether uncertain and unreliable. It is a mere matter of physical temperament, some persons being endowed with a strong endurance of pain, and defying the utmost malice of tyrannical power to force them to do anything, others shrinking at the first touch of pain, and ready to invent any fable or admit any crime, however atrocious, if such admission would tend to avoid further pain; and the latter class far outnumbers the former. Such has always been felt to be the weak point of this species of evidence in all times.[1] But the one unanswerable objection to it is, that it is an attempt of courts of law to achieve the impossible, for no human being if he chooses to resist can be forced to disclose the secrets of his own mind; and all the efforts of tyranny, of law, or of power are utterly impotent and idle, when brought to bear on a subject wholly beyond the reach of their jurisdiction.

The torture of peine forte et dure.—But though England freed itself two centuries ago from the disgrace of torturing persons accused of crime, a still more disgraceful relic of the same barbarous practice lingered for a century longer and with much less justification. A punishment, or rather an incident of trial preceding sentence resembling the rack, was the *peine forte et dure,* being a mode of torturing a person to compel him to plead and say whether he was guilty or not guilty, so as to enable, as it was said, his trial to proceed. The prisoner sometimes obstinately refused, because, it was held, he could not then be tried or convicted, and so could not be subject to forfeiture. Coke's only reason for this terrible judgment is, that the prisoner "refuseth to stand to the common law of the land" —a reason which, if good for anything, would apply equally well to most defendants even in civil actions.[2] Hale asserted that this practice was part of the common law, which it is difficult either to assent to or contradict.[3] And though he calls it severe punishment, he did not suggest that it was a barbarity not fit to be tolerated. He merely recommended that the prisoner be respited till the afternoon or next morning, to bethink himself how serious

[1] Dig. lib. xlviii. tit. 18; Tacit. Ann. b. xiv. § 60. [2] 2 Inst. 178.
[3] 2 Hale, P. C. 321; Barringt. Stat. 82.

it would be for him to hold out. This judgment was described in the time of Edward I. to be this; that a prisoner standing mute was ordered to be put in a house on the ground in his shirt, laden with iron, and with nothing to eat, and the water to be given to him was to be neither river nor fountain water.[1] But Britton describes it thus: "The judgment for standing mute is, that the prisoner should be put in a low dark chamber, and there laid on his back on the bare floor naked, unless where decency forbids, and that there be placed upon his body as great a weight of iron as he could bear; and more, that he have no sustenance, save only on the first day three morsels of the worst bread, and on the second day three draughts of standing water, that should be nearest to the prison door, and in this situation this should be alternately his daily diet till he died or answered."[2] Persons who stood mute were obviously long thought by the legislature to act on the notion of pretending muteness in order to escape being tried and found guilty, and so losing, as they thought, the benefit of clergy. On that account it was, that the statute of Henry VIII. took their clergy from those standing mute.[3]

This practice of punishing those standing mute was supposed by Stamford to be introduced by Stat. Westm. i. c. 12, for Bracton did not allude to it, while Britton did.[4] It has been argued in very recent times, that this practice was not so bad as the rack, for one was aimed at causing the party to plead, and the other to confess; but such a distinction is unworthy of notice.[5] Nor can it be urged as counsel once urged, that it was necessary, because otherwise the prisoner might evade punishment.[6] It was stated by Dallas in argument, that this atrocious punishment had been inflicted since the accession of George II. in 1727.[7] And it is related that in 1726 a gentleman at Kingston stood out nearly the whole punishment.[8] And so late as 1734, at the Old Bailey, thumb-torture was applied in order to induce prisoners to plead.[9] It was not finally abolished till 1772, and then it was ordered, that instead of the

[1] Year B. 30 & 31 Ed. I. App. 511. [2] Britt. c. 4, 22; Flet. b. i. tit. 34, § 33. [3] 25 Hen. VIII. c. 3. [4] Stamf. P. C. b. ii. c. 60; 2 Hale, P. C. 321. [5] Per Nolan, arg., 30 St. Tr. 897. [6] Per Garrow arg., Ib. 849. [7] R. v Picton, 30 St. Tr. 828. [8] 2 Pike on Crime, 283. [9] Ibid. 284.

punishment the prisoner should be deemed guilty of the offence charged. It was not till 1827 that what was obviously the only equitable treatment was discovered, namely, that he should be taken as if he denied the charge alleged, and then that the trial should proceed in the usual way on that footing.[1]

Imprisonment and the remedies against it.—The most usual grievance to those who appreciate and enjoy liberty or security of the person, is one which is the least directly injurious in one sense, and yet an intolerable pain—but more mental than bodily—in another sense, especially when long continued; and that is imprisonment or the deprivation of the natural right of locomotion. In the eye of the law no prison or dungeon is necessary to aggravate this annoyance; it is enough, that when one is disposed to go to the right hand or the left hand—forward or backward—to pursue one's interest or pleasure, or duty, in one's own way, and at one's own time, this cannot be done by reason of some physical obstacle, and by substituting another's pleasure for one's own. And this is still more annoying whenever one's own pleasure and discretion are for the moment everything. Every restraint of a man's liberty or keeping the custody of another, either in a gaol, or in a house, or in the stocks, or even in the street, is in law an imprisonment; and, whenever it is done without a proper authority, is false imprisonment, for which the law gives an action. And this is commonly joined to assault and battery, for every imprisonment includes a battery, and every battery an assault.[2] One of the remedies for this false imprisonment is an action of damages, and this remedy it is now necessary to explain.

What is in law an imprisonment.—False imprisonment or illegal restraint is not necessarily any physical restraint: it may consist in a threat or intention to restrain on the part of one who has, or is reasonably believed to have, the physical force at hand to effect such restraint then and there. Coke says there may be a prison in law and a prison in deed,[3] and that four walls are not necessary for a prison.[4] Thus it is a constructive imprisonment, where a man is told by a bailiff or constable that he is a prisoner,

[1] 12 Geo. II. c. 20; 7 & 8 Geo. IV. c. 28, § 2. [2] Bull. N. P. 22.
[3] 2 Inst. 589. [4] Ibid. 482.

though such bailiff lays not a hand upon him.[1] And hence when a person is told by a bailiff that such bailiff has a warrant to arrest him, and the person goes with the bailiff peaceably without being touched, this is also an imprisonment.[2] And as a salutary warning not to be forgotten, a judge held in one case, that where a person met another in the street and made him stop against his will till a libellous letter was read to him, this was an imprisonment in the eye of the law, for which the action lies.[3] And like manner it is an imprisonment, when one is in such a situation, that he reasonably believes another can compel his imprisonment, so that it is useless to resist; as for example, when a person pretends he is a constable and has a warrant in his pocket, and the prisoner believes, and submits without being touched.[4] And when one is detained as a prisoner, after he has already a right to discharge, this is in the eye of the law a fresh imprisonment.[5] But a mere obstruction of a party from going in one direction while other directions are open, is no imprisonment, for in that case there is no complete restraint, and a prison must have a boundary, though it need not have walls.[6] And, therefore, where the owner of land obstructed a public highway, and hired policemen to stand and prevent the public going in one direction, but allowing them to stay where they were, or go back and anywhere else, this was deemed not to amount to an imprisonment, though one judge (who was overruled by three others) said it was the same thing in his opinion as if each passenger had been pulled by the collar out of one line and made to go in another line.

This doctrine of partial restraint must obviously not be pushed too far. If I am locked in a room, I am not the less imprisoned, because I might effect my escape through the window, or, because I might find an exit dangerous or inconvenient to myself, as by wading through water or taking a route so circuitous, that my necessary affairs would suffer by delay. In all such cases the rule should be, that, though the restraint is only in one direction or one side, yet if the person restrained is in such a situation that

1 2 Inst. 589; Warner v Riddiford, 4 C. B., N. S. 206; Grainger v Hill, 4 Bing. N. C. 212. 2 Bull. N. P. 62. 3 Bird v Jones, 7 A. & E. 752, 755. 4 Wood v Lane, 6 C. & P. 774. 5 Withers v Henley, Cro. Jac. 379. 6 Bird v Jones, 7 Q. B. 742.

he would suffer danger or great inconvenience by taking the other direction, or that, as a reasonable man, he would be brought to a standstill, then the imprisonment seems to be complete.[1]

The general rule as to all this kind of physical pressure is, that no person, for any cause whatever, can arrest or imprison another. The lawful exceptions are, where a party is arrested in execution of civil or criminal process, or other legal authority, such legal authority being either a writ of execution or commitment on a judgment or decree or order of some judge, or warrant of a justice of the peace, or in cases previously mentioned without any warrant. All the exceptions in short derive their authority from, and in some way are founded on, a cause of crime or of debt, or some statute which describes certain conditions or situations which one fulfils at the moment. It thus requires considerable reflection and experience to know when such an exceptional case exists, and when and how the mode of enforcing it is regular and incapable of resistance. When no valid exceptional ground exists, it is called a false imprisonment.

The four remedies described by Coke in case of unlawful imprisonment are (1) an action on the statute or great charter; (2) an indictment; (3) a *habeas corpus*; (4) an action for false imprisonment.[2] But practically there are only two remedies, namely, by action, or by *habeas corpus*. If the imprisonment has been temporary, arising from mistake or on some ground discovered to be untenable, and the imprisonment is past, then the appropriate remedy is by action. If the imprisonment is continued and persisted in, then the appropriate remedy is by writ of *habeas corpus*. The former generally redresses all kinds of mistakes, however trivial, after the imprisonment has ceased. The latter goes to the root of the matter and copes with every conceivable difficulty involved in a continuing imprisonment, which is illegal, but which is sought to be stopped at once.

Remedy by action for false imprisonment.—It will be proper first to notice the remedy by action for false imprisonment, and here a distinction is made, which turns on the cause or alleged manner in which the imprisonment

[1] See per Denman, C. J.; Ibid. [2] 2 Inst. 55.

was brought about. If the imprisonment arose from some actual or constructive seizure either by the hand or by the command of the wrongdoer, whatever the motive may have been, then an action for false imprisonment is the remedy. If on the other hand the imprisonment arose from merely setting the machinery of criminal or civil process in motion, and thereby causing the imprisonment indirectly through the agency of the courts, then this is called an action for malicious prosecution, for the officers of the law not being responsible, and being only mechanical agents, the remedy lies against him who was the prime mover, and who directed such officers what to do. This indirect injury is a cause of action, when malice was part of the wrongdoer's motive, and hence it is, that this latter action is called an action for malicious prosecution.

The action for false imprisonment is founded on the doctrine, that a man's liberty is too precious a thing to be interfered with even for a few moments, and whether the person, who so interfered, made a mistake and acted inadvertently or deliberately, is of no consequence. He who interferes with another's liberty must take the risk of his own mistakes; and hence it is immaterial, what was the wrongdoer's motive, or how he came to do the wrongful act. It is enough to the aggrieved that he suffered the wrong; and whoever caused that wrong, whether master, or servant, or agent, must be responsible in damages. Most of such actions arise out of persons, or their servants, erroneously giving others into custody of a constable, and the length of the imprisonment is altogether immaterial, except as rendering the damages, which are recoverable, greater or less in amount.

Some exceptions to liability for false imprisonment.—Though the general rule is, that he who causes the imprisonment of another wrongly is liable in damages, yet there are a few exceptions and qualifications arising from the situation and duty of the person who made the mistake. It was once said, that where an officer of the crown does an act in the course of his duty, or under a special order or ratification of the crown, which injures a third party, he was not liable to such third party. This was founded on the false analogy of master and servant, it being argued that if the crown cannot be guilty of negligence or personal

misconduct, and is not responsible for the negligence or personal misconduct of its servants, it follows that there can be no remedy at all.[1] But it was afterwards explained, that the servants of the crown do not act in their several capacities by the will of the crown, as servants ordinarily do by the will of a master. The crown appoints most of the servants of the state through an officer of state; the will of the sovereign does not control the conduct of the servant; and the act done by the servant cannot be said to be impliedly done by order of the sovereign, but rather by reason of some mistake of his own for which he is therefore responsible.[2] And even, if the personal command of the sovereign were pleaded, it cannot be used to defend the servant, but is treated as no command at all.[3]

How far judges liable for false imprisonments.—Many of the false imprisonments are naturally ordered by courts or judges, or arise out of judicial proceedings. A person acting judicially is not liable to be sued for anything done according to the best of his judgment on a matter within his jurisdiction; and the matter of fact so adjudicated by him cannot be put in issue in an action against him, for the record itself is the only evidence of what was done.[4] One of the first principles of natural justice, and which the feelings of every man suggest to him, is, that no person, acting judicially, who has used his best endeavours to inform himself, ought to suffer for an error in judgment.[5] And it has been held, that a judge is not liable, even though malice be alleged, if the case is within his jurisdiction.[6] But though a judge is not liable to an action for an error in judgment, be may be sued in his own or any other competent court for things done out of his judicial character;[7] or even for things done as a judge, if his appointment is invalid.[8] Such is the rule as to all the judges of the High Court of Justice. A judge of a county court is also not liable for acts done in his judicial capacity, except where he has no jurisdiction, and is not misinformed

[1] Canterbury v Att.-Gen. 1 Phill. 306. [2] Tobin v R., 16 C. B., N. S. 310. [3] Ibid. [4] Mostyn v Fabrigas, Cowp. 172; Kemp v Neville, 10 C. B., N. S. 523. [5] Dallas, arg., 30 St. Tr. 832. [6] 30 St. Tr. 796. [7] R. v. Johnson, 29 St. Tr. 82; Houlden v Smith, 14 Q. B. 841. [8] Gahan v Lafitte, 3 Moore, P. C. 382.

as to the facts on which such jurisdiction depends.[1] And his mistaking the law as applied to facts which give no jurisdiction, will not exempt him from responsibility, though it would be an exemption if the facts did give jurisdiction.[2]

The liability of justices of the peace—who have most to do with imprisonments—depends on the following circumstances. They also, like other judges, are not liable for any mistake of judgment, while dealing with facts giving them jurisdiction. And no action against them will lie for an act done within their jurisdiction, unless it be alleged that they did it maliciously, and without reasonable and probable cause.[3] And in cases where a justice has acted without jurisdiction, he cannot be sued, unless the conviction or commitment has first been quashed,[4] for a conviction, so long as it is in force, is conclusive evidence of the facts.[5] In coming to a conclusion as to the preliminary question of fact, whether they have jurisdiction, justices are not liable for an error of judgment any more than for an error in deciding on the merits, and yet the superior court may examine whether they were right or not on that point.[6] The rule thus is, that a justice cannot be liable for a mistake as to his jurisdiction, unless he had the knowledge, or the means of knowledge, of which he ought to have availed himself, of that which constitutes the defect of jurisdiction.[7] And hence, malice and want of reasonable cause must be alleged, if an action is brought against justices for any such mistake.[8] But if justices are acting, not judicially, but ministerially, they must, like all other persons, take the risk of the mistakes they make, when injury is done thereby to third parties.[9]

Defendants in actions for false imprisonment.—There are some points requiring to be distinguished in suing for false imprisonment. The person, who is the sole moving cause of the imprisonment is liable to an action, if there was no

1 Houlden *v* Smith, 14 Q. B. 841. 2 Ibid. 3 11 & 12 Vic. c. 44, § 1. 4 Ibid. § 2. 5 Fawcett *v* Fowles, 7 B. & C. 394. 6 Bunbury *v* Fuller, 9 Exch. 111, 146; Pease *v* Chaytor, 3 B. & S. 620. 7 Calder *v* Hacket, 3 Moore, P. C. 28; Carrott *v* Morley, 1 Q. B. 18. 8 Pease *v* Chaytor, 3 B. & S. 620. 9 Davis *v* Capper, 10 B. & C. 28.

legal excuse or justification. But a distinction is to be drawn between one who merely *bonâ fide* gives information to a constable, leaving the constable to take what action he pleases on such information, and one who absolutely asserts and guarantees the information which he has of his own or another's knowledge, and calls on the constable to imprison the party at once without further inquiry. In the former case the informer is not liable to an action; in the latter he is so. Thus he was liable, where in a time of impressing seamen, he asserted, that a particular sailor was liable to be impressed, and directing immediate seizure;[1] and it is the same where in any case he directs a constable to apprehend a particular person, and it is done.[2] But he is not liable in like cases, where he does nothing more than give information of a felony, and directs no arrest, but merely, when the party is arrested, goes and signs the charge sheet; and yet this last fact is generally a strong circumstance to show that the defendant did cause the imprisonment.[3] All persons who assist in the imprisonment are equally liable to an action; and one constable acting on the word of another is equally liable.[4] And a corporation or company is liable to an action, if a servant of theirs, acting in the course of his duty, has caused the imprisonment.[5] Even when an agent or servant, without express authority, and not acting in the ordinary course of duty, imprisons another under the notion that he was acting for the benefit of the principal, who afterwards ratifies it, the principal will be liable as well as the agent.[6] Moreover, though it is usual for a defendant in such cases to accumulate as many defences as he can, it is enough if he prove a sufficient number of facts to discharge him from liability, even though others have been alleged and not proved.[7]

Notice of action of false imprisonment.—At common law no notice of action requires to be given before suing for false imprisonment, but in cases where the alleged illegal act was done under the authority of some statute, it is

[1] Flewster *v* Royle, 1 Camp. 188. [2] Hopkins *v* Crowe, 4 A. & E. 774. [3] Grinham *v* Willey, 4 H. & N. 499; Brown *v* Chapman, 6 C. B. 374; Harris *v* Dignum, 29 L. J., Exch. 23. [4] Griffin *v* Coleman, 4 H. & N. 265. [5] Goff *v* Gt. Northern R. Co. 2 E. & E. 672. [6] Eastern Co. R. Co. *v* Broom, 6 Exch. 314. [7] Hailes *v* Marks, 7 H. & N. 56.

generally provided by such statute, that a notice of action should be given within a certain number of days before action commenced. Many such statutes authorise owners of property or occupiers of premises to arrest or give into custody any party found offending, and it is usually out of these exceptional powers that such actions take their rise. In all actions against justices of the peace for anything done by them in the execution of their office a month's written notice of action must be given.[1] And a month's notice is the general rule under all statutes which require any notice of action.[2] In cases of this description a notice of action is only required where the defendant acted illegally, but under an honest mistaken belief that the statute authorised the illegal act. If the defendant acted under this honest mistake, it is not necessary to entitle him to notice, that he should have acted on reasonable grounds, or should have known the precise statute and section under which he conceived himself to be so authorised. It is enough that the defendant *bonâ fide* believed in the existence of a state of facts, which, if they had existed, would have afforded a defence to the action.[3] The want of *bonâ fide* belief that the statute authorised the act is not, therefore, the necessary result of there being no reasonable ground for such belief.[4] Where the power to arrest depends on whether the party was found committing the offence, some reasonable evidence of the commission of an offence is necessary.[5] And where the power to arrest depends on the arresting party filling some official situation or standing in some legal relation, some reasonable evidence of his filling such situation must also be given.[6] A man may reasonably believe he fills that official character, though he mistake some of the facts that make up such character.[7]

Amount of damages recovered for false imprisonment.—One peculiarity of this kind of action is the wide margin allowed to juries in fixing upon the amount of damages which they think adequate in the circumstances. The

[1] 11 & 12 Vic. c. 44, § 9. [2] 5 & 6 Vic. c. 97, § 4. [3] Roberts *v* Orchard, 2 H. & C. 769; Heath *v* Brewer, 15 C. B., N. S. 803; Chamberlain *v* King, L. R., 6 C. P. 474. [4] Hermann *v* Seneschall, 13 C. B., N. S. 392. [5] Cann *v* Clipperton, 10 A. & E. 588. [6] Booth *v* Clive, 10 C. B. 835. [7] Kine *v* Evershed, 10 Q. B. 150.

judge will neither dictate beforehand nor closely advise the jury what to give, nor, after the jury have fixed upon a sum, will the court interfere with the amount by directing a new trial unless such damages be reduced. At least this will only be done where the jury have acted in a very extravagant manner. In one case, where a man was imprisoned for twelve months, and the verdict gave him 3,000*l.* damages, which the defendant sought to set aside as excessive, De Grey, C. J., refused in these words to interfere: "To say what is the value of the liberty of a man's person, secluded from his family under circumstances of hardship for twelve months, is a difficult matter. Men's minds will vary much about it. I should think one thing; another would think another. In this case of personal wrongs, what has the law said? The law has said, that a jury of twelve men shall be judges to determine and assess the compensation for that personal wrong. We cannot but recollect what passed in these unfortunate affairs that happened about the Secretary of State and a printer's boy. A servant is taken up under a mistake and carried to a better house than his own; is fed with better provisions than he had of his own; and is treated better than he would have been treated when at home. Yet he brings an action of false imprisonment, and has 300*l.* damages. It was more than he could earn for years. But the court said, we are not the judicature to determine as to the deliberate judgment of a jury upon such a subject as this. Have the jury exercised their judgment, or is there any imputation upon their conduct except the idea of the compensation not being proportioned? Not at all. I cannot prescribe to the jury what I think is the value of personal liberty."[1] In the case alluded to of a printer's boy getting 300*l.*, he was detained under a Secretary of State's warrant only for six hours and well treated.[2] And an attorney detained six days in custody obtained 1,000*l.*[3]

Action for malicious prosecution generally.—A malicious prosecution, as already stated, is where the wrongdoer maliciously set the machinery of the law in motion, whereby the plaintiff was either in due course of law put in prison, or at least ran the risk of being so. Inasmuch

[1] Fabrigas v Mostyn, 20 St. Tr. 182. [2] Huckle v Money, 19 St. Tr. 1405. [3] Beardmore v Money, 19 St. Tr. 1405.

as the officers of court merely act ministerially, they are not to blame, and therefore the remedy is given against him who maliciously commenced the prosecution. And malice, it will be seen, is the gist of this action. Some punishment is due from those who thus causelessly seek to injure and annoy another; and false accusations have in all ages been more or less punishable in various ways.[1]

So early as 1372 it was deemed indictable at common law to conspire to indict one falsely of felony; and for that offence, when brought at the king's suit, the offender's house was wasted, his trees cut down, his wife and children ousted, and himself imprisoned.[2] And after various developments of the law, combinations to charge a person falsely, in order to obtain money, were indictable, whether the acts charged were criminal or merely disgraceful.[3] And even, though there is no intent to extort money, a combination to prosecute a man, right or wrong, is indictable.[4]

In these actions for malicious prosecution, therefore, whenever one puts the criminal law in motion maliciously and without reasonable or probable cause, whereby another has suffered damage, this is a ground of action.[5] The ingredients of the action are the innocence of the plaintiff or the want of proof of his guilt; the malice of the defendant and the want of reasonable and probable cause for the accusation; and the actual injury caused to the plaintiff. As regards the malice, it is not enough to prove malice alone, for malice may coexist with reasonable and probable

[1] The Greeks made false accusations dangerous by punishing with a fine those who failed, and Æschines, who accused Ctesiphon, had to pay the fine.—*Philostr.* b. i. And a false accuser in Rome was branded with the letter K, and guards were appointed to watch that he did not corrupt the judges or witnesses.—*Montesq.* b. xii. c. 20. Macrinus made a law, condemning to death all informers who could not make good their accusations; but if they succeeded, they got one fourth of the criminal's estate. Theodosius put to death an informer who had acted as such three times. Gratian made a law, that, if an informer did not make out his case, he was himself to suffer the intended punishment.—*Cod. Theod.* tit. 1, leg. 14.

[2] 46 Ass. 11, p. 307. [3] R. *v* Rispal, 3 Burr. 1320, 1 W. Bl. 368.

[4] Tailor's Case, Godb. 444; Re Best, 2 L. Raym. 1167; 1 Salk. 174; 6 Mod. 185. [5] Churchhill *v* Siggers, 3 E. & B. 937.

cause, and in that case is no ground of action.[1] This malice is essentially a question of circumstances. It may be inferred from rashness or neglect of inquiry, where means of inquiry existed;[2] and from the fact that the prosecution was instituted for a collateral purpose, such as for frightening others or enforcing payment of a debt.[3] But the kind of malice alleged is not necessarily any personal spite or hatred towards the plaintiff, provided that kind of *malus animus* can be inferred, which is popularly denominated improper motives.[4] And malice cannot be inferred from the mere fact of the defendant having, though harshly, enforced a right by civil process, or discharged a public duty by instituting a prosecution;[5] nor from the mere fact of abandoning a prosecution once begun, for that may be an imperative duty.[6] On the other hand, the inference of malice is not displaced or rebutted by merely showing that the magistrate bound the defendant over to prosecute, for this result may have been procured by falsehood and fraud;[7] or that counsel's opinion was taken and he recommended the prosecution.[8]

Proof of want of reasonable and probable cause.—Though malice may be inferred from want of reasonable and probable cause, the latter cannot be inferred from malice. Malice and want of reasonable and probable cause are inferred from the acts, and conduct, and expressions of the defendant: as, for example, the existence of a collateral motive in the defendant, such as a resolution to stop the plaintiff's mouth;[9] or an attempt to conceal the consciousness that he was at first in the wrong;[10] or the knowledge by the defendant that the plaintiff had committed the alleged offence in *bonâ fide* vindication of a legal right;[11] or from waiting for three months to make the accusation, though in possession of the means of at

[1] Willans *v* Taylor, 6 Bing. 186; 2 B. & Ad. 845; 3 M. & P. 350. [2] Busst *v* Gibbons, 30 L. J., Ex. 75. [3] Stevens *v* Midland R. Co., 10 Exch. 356; Macdonald *v* Rooke, 2 Bing. N. C. 219. [4] Stockley *v* Hornedge, 8 C. & P. 11. [5] Philips *v* Naylor, 4 H. & N. 565. [6] Purcell *v* Macnamara, 9 East, 363; 1 Camp. 202. [7] Fitz John *v* Mackinder, 9 C. B., N. S. 505. [8] Hewlett *v* Cruchley, 5 Taunt. 283. [9] Haddrick *v* Heslop, 12 Q. B. 267; 23 L. J., Q. B. 49. [10] Hinton *v* Heather, 14 M. & W. 131. [11] Huntley *v* Simson, 2 H. & N. 600.

once proceeding in the action;[1] or from the fact of acquiring knowledge of plaintiff's innocence and not abandoning the prosecution;[2] or from putting an advertisement in a newspaper notifying the finding of the indictment by the grand jury.[3]

Malice and want of reasonable and probable cause, however, are conclusively disproved by the conviction of the plaintiff.[4] In the action the plaintiff is bound to show that the prosecution is ended; and that he was acquitted, if a charge was made, or that the conviction was appealed against and reversed;[5] or that the information before justices of the peace was dismissed;[6] or, when the cause of action was arresting or holding to bail, that the original action was determined, or the plaintiff was discharged; or that the suit was determined in some way otherwise than by consent, so that it may appear *primâ facie,* that the action was without foundation.[7] But if the ground of action was exhibiting articles of the peace, no such obligation to show a successful defence is incumbent, for the nature of such a case prevented the plaintiff from controverting the statement against him.[8]

The question for jury in action for malicious prosecution.—Whether the facts on which the defendant professed to act in instituting the prosecution were true or were honestly believed to be true, is a question of fact for the jury; but whether, assuming they were true, they ought to have reasonably induced the defendant to prosecute, in other words, whether they amounted to reasonable and probable cause, is a question of law for the judge.[9] Therefore the judge should separate the facts from the law; and first leave the truth of the facts to the jury, and the inferences to be drawn from them, as to the knowledge, belief, and conduct of the defendant; after which he must himself determine, according as the jury find the

[1] Williams v Banks, 1 F. & F. 557. [2] Fitz John v Mackinder, 9 C. B., N. S. 505. [3] Chambers v Robinson, 2 Str. 691. [4] Mellor v Baddeley 2 Cr. & M. 678. [5] Whitworth v Hall, 2 B. & Ad. 695. [6] Mellor v Baddeley, 2 Cr. & M. 675. [7] Norrish v Richards, 3 A. & E. 737; Brook v Carpenter, 3 Bing. 297. [8] Steward v Gromett, 7 C. B., N. S. 191; Basebe v Mathews, L. R. 2 C. P. 684. [9] Panton v Williams, 2 Q. B. 193; James v Phelps, 11 A. & E. 488; Busst v Gibbons, 30 L. J., Ex. 75.

facts proved or not proved, and the inferences warranted or not, whether there was reasonable and probable ground for the prosecution or the reverse.[1] It has indeed latterly been thought that it would be better to leave to the jury as an inference of fact the sole determination, whether there was or was not this reasonable and probable cause in the whole circumstances.[2]

Damages recoverable for malicious prosecution.—It is essential for a plaintiff, in order to be entitled to damages, to prove that he was actually damaged, either in loss of character, danger of losing life or liberty, or damage to his property, such as paying money out of pocket to obtain acquittal.[3] Part of the damages will consist of the money expended, or the solicitor's bill incurred, in defending himself against the prosecution, or defending himself and others, if his own case was not severable from others.[4] Where the jury by their verdict give a large amount as damages, the court will not grant a new trial merely on the ground of excessive damages, unless the amount was grossly disproportionate to the relative situation and conduct of the parties. In one case, where a wealthy usurer had indicted a baronet, one of his borrowers, for horse-stealing, then a capital felony, and the prosecution was used only with a view to put a stop to actions for usury, and on which indictment there was an acquittal, the jury gave 10,000*l.* damages: and the court refused to disturb the verdict by granting a new trial on account of any excess.[5]

Early remedy by writ for illegal imprisonment.—The Great Charter, c. 29, laid down the rule, that no one was to be imprisoned except by a court of law, or by the law of the land. This was a valuable idea, and very far in advance of the times. But these words, which Lord Chatham said were worth all the classics, though satisfying the mind, still lead to the further inquiry—What is the law of the land, and what can a court of law do or not do? The answer involves many details and qualifications, before a complete account can be rendered. Glanville shows, that in the time of Henry II., when

[1] Douglas *v* Corbett, 6 E. & B. 515. [2] Lister *v* Perryman, L. R., 4 H. L. 521. [3] Byne *v* Moore, 5 Taunt. 188; Rowlands *v* Samuel, 11 Q. B. 39. [4] Ibid. [5] Leith *v* Pope, 2 W. Bl. 1326.

a person was accused of crime, he was allowed to give bail, and failing bail, he was imprisoned; and except in homicide, bail was not refused. In homicide it rested with the king's pleasure to discharge him or not.[1] And in such case, to guard against long imprisonments, the prisoner could sue out a writ *de odio et atiâ*, which was practically easily available, and enabled the sheriff to inquire, whether the charge brought forward was made out of hatred and spite; and if so, to take twelve men as mainpernors or bail, and discharge him.[2] And if parties were kept long in prison, this writ *de odio et atiâ* was allowed, "like as it was declared in Magna Charta and other statutes." [3] Bracton said the writ *de odio et atiâ* ought to be denied to no one. And Coke says, though the writ was restrained and abolished by the statute 28 Edward III. c. 9, yet a later statute, 42 Edward III., c. 1, repealed all statutes inconsistent with Magna Charta, and so that writ was thereby revived.[4] He further says, that "the law doth so hate the long imprisonment of any man, that it gave by Magna Charta a writ *de odio et atiâ*, which was not to be denied, and was to be granted gratis and without delay." [5]

Another writ was available in false imprisonment. This was the writ of *homine replegiando*, which was the only common law remedy against a private person who imprisoned another; and it issued only on cause shown in a petition to the Great Seal.[6] Thus where one Jennings had got a young heiress into his custody, without the consent of her guardian, the Attorney-General obtained that writ to recover her.[7] At common law, every person could defend himself by force, and repel force with force; and articles of the peace were available against all who threatened such liberty. But if, notwithstanding all resistance, the party was imprisoned, then the remedy was by a writ of *homine replegiando*.[8] This writ issued out of the Chancery Division, and went to the sheriff, who, on failing to obtain possession of the man in custody, obtained a process authorising him to arrest the person who

[1] Glanv. b. xiv. cc. 1, 2. [2] 1 Reeve, Hist. C. L. c. 5. [3] 13 Ed. I. c. 29. [4] 2 Inst. 43, 55. [5] Ibid. 41. [6] 3 St. Tr. 632. [7] 2 Freem. 27. [8] Wilmot, 95.

detained him, and to keep him in prison till the body of the imprisoned person was produced.[1]

Coke, in commenting on the article of the Great Charter already referred to, says: "And therefore every subject of this realm, for injury done to him in goods, in land, or in person, by any other subject, be he ecclesiastical or temporal, free or bond, man or woman, or be he outlawed, excommunicated, or any other, without exception, may take his remedy by the course of the law, and have justice and right for the injury done to him freely, and without sale, fully without any denial, and speedily without delay." And believing, as judges of his age erroneously believed, that this ancient fundamental law could not be changed by an act of parliament, made in the face thereof, he denounced an act of 11 Henry VII., which empowered justices of the peace (without the finding or presentment by the verdict of twelve men) upon a bare information of the king before them, to determine all offences and contempts committed—"by colour of which act, shaking this fundamental law, it is not credible what horrible oppressions and exactions, to the undoing of infinite numbers of people, were committed by Empson and Dudley, two justices of the peace—these two oppressors, who came to fearefull ends."[2]

Writ of habeas corpus *before* Habeas Corpus *Act.*—It thus appears that by force of the common law, of which Magna Charta has been treated as a declaration, the principle that no one could legally be imprisoned except for known crimes was settled. The writ of *habeas corpus* was one remedy for that mischief, and was open to all persons who were imprisoned, and the court was bound to discharge the prisoner unless the committal specified a known crime. And in the case even of crimes he was in most cases released on bail. But, owing to the influences that in early times could be brought to bear on courts and judges, this duty was not heartily appreciated and promptly discharged; and cases from time to time occurred which showed that some powerful spur was needed to keep the courts in the even tenor of their duty as to this vital point of personal freedom. The writ of *habeas corpus*, as has

[1] Fitz. N. B. 67 b.

[2] 2 Inst. 51.

been said, was thus a right preserved with great difficulty, and in 1591 eleven judges in a body remonstrated against its abuses and insufficient remedy. That memorandum stated, that the subject was often committed or detained in prison by commandment of any nobleman or councillor, and after discharge put again in secret prisons, and not the ordinary known prisons of Marshalsea, Fleet, King's Bench, and Gatehouse, or under the sheriff, so that the Queen's Court did not know where to direct the writ to. People were imprisoned by pursuivants till they would forego their causes. The same paper said, that commitment by her majesty's justices' special commandment or by order of the council board, or for treason touching her majesty's person, were good causes; but all other causes ought specially to be returned.[1]

The intrepid champions of liberty, who appeared when they were most needed in the early part of the reign of Charles I., were fully possessed of the secret of this danger, and the most likely quarter from which it might be expected. In the case of Darnel, they fought the battle against time-serving judges and were defeated; but they took care to set the matter right in the Grand Remonstrance and the Petition of Right. Yet though Charles I. assented to the Petition of Right, which prayed that no freeman should be detained merely by the king's special command, signified by the lords of the privy council, the king in the following year, 1629, again arrested Selden and others, and sought to evade the force of his concession. When the cause of commitment was inquired into under another writ of *habeas corpus*, it was returned, that the prisoners were committed by the king's special command "for notable contempts committed against the king and his government, and for stirring up sedition against him." [2] These words were said not to amount to the charge of a capital offence, and therefore the prisoners were entitled at least to be bailed. They were however at first ordered to find bail and sureties for their good behaviour, and failing their doing so were remanded to prison. Some were afterwards discharged, and others who were proceeded against by information were fined. Owing to delays, no final decision

[1] 1 Hallam, C. H. 235. [2] Re Stroud, 3 St. Tr. 235.

was ever given, but such as was given was at a later time solemnly reversed.[1]

At the next important stage in the same constitutional warfare, the statute which abolished the Star Chamber expressly enacted, that when any person should be imprisoned by the command or warrant of the king, or his privy council, or any lord thereof, he should be entitled to demand in open court a writ of *habeas corpus*, and to be brought before the judges, and have the true cause of his imprisonment certified and examined, as to whether it was just and legal or not, and the judge or officer wilfully refusing to do these things should forfeit treble damages.[2] And any judge, justice, or officer wilfully doing or omitting to do anything contrary to the act, shall forfeit to the party treble damages, recoverable by action of debt within two years.[3]

Again, in 1676, one Jenkes, a trader in London, having delivered a speech at Guildhall, commenting freely upon the decay of trade, and the dangers of Protestants, and the necessity of calling a new parliament, was summoned before the council board, and committed to prison by the council, the only ground being, " for stirring persons in a seditious manner." And it was not till after considerable delay that he was released on bail.[4] Hallam observes that the *Habeas Corpus* Act did not arise, as is often supposed, out of Jenkes' case; but out of the arbitrary proceedings of Lord Clarendon.[5]

Passing of Habeas Corpus *Act in* 1679.—The defect, the danger, and the delay now referred to, having never been lost sight of, at length, on May 27, 1679, the *Habeas Corpus* Act passed, and, after the lapse of two centuries, it has been found by experience to have made the machinery revolve so promptly and cut so clearly into the marrow of all the mischiefs attending the possession of might, regardless of right, that no king or minister, led away with the dream of power, has since sought seriously to baffle or disable it. That which Coke said, with mis-

[1] 2 Hallam, Const. H. 3, 6 (8 ed.); 2 Rapin, Hist. Eng. 280; 6 Hume, Hist. E. 276. [2] 16 Ch. I. c. 10; Cowley's Case, 2 Swanst. 41; Bushell's Case, Vaugh. 154. [3] 16 Ch. I. c. 10, §§ 7, 10. [4] Re Jenkes, 6 St. Tr. 1189; Per Eldon, L. C., 2 Swanst. 46. [5] 2 Hallam, C. H. 132.

placed eulogy of the Star Chamber, may be said of it, that it keeps all England quiet. It is now a familiar code, and represents a whole armoury of strength, for every line and syllable of which each citizen would fight to the last, as for his household gods. Holt said every man should be concerned for Magna Charta. And the *Habeas Corpus* Act is only a natural sequel and development of Magna Charta. No dictator, whether single-handed or hydra-headed, can long breathe the same air with those who have caught the secret of its power. It appeals to the first principles of security, and to the law of nature, if any such there be. Its whole essence is nothing else than this. Every human being, who is not charged with or convicted of a known crime, is entitled to personal liberty. If debt requires imprisonment, and a court has found it due, be it so. But if one is imprisoned neither for a known crime nor a debt, then the gaoler, whoever he be, must instantly state the reason why, or take the consequences. And if one is imprisoned for treason or felony, he can insist on being tried in the second term or assizes after commitment, or on being released.[1] As was said

[1] The *Habeas Corpus* Act of 1679 gave the right only to those imprisoned or pretended to be so, "for crime other than treason or felony;" but the act of 1816 supplemented it by giving the right to those imprisoned "for any cause whatever, except crime or debt." And thus the two Acts covered nearly the whole field of possible illegal imprisonments. BLACKSTONE says that the merit of the *Habeas Corpus* Act lies in its clearly defining the times, the causes, and the extent when, wherefore, and to what degree the imprisonment of the subject may be lawful.—3 *Bl. Com.* 133. And KENT says, it is an easy, prompt, and efficient remedy; and personal liberty is not left to rest for its security upon general and abstract declarations of right.—2 *Kent's Com.* 30.

"The *Habeas Corpus* Act is the most important barrier against tyranny, and best framed protection for the liberty of individuals, that has ever existed in any ancient or modern times."—*C. J. Fox, Hist. Introd.*

"It is a law which not by circuitous, but by direct operation adds to the security and happiness of every inhabitant of the realm."—1 *Macaulay, Hist.* c. 6.

"In the laws of Arragon a process, called manifestation, was competent to any person imprisoned, by which he could be instantly released from the royal officers and handed over to the officers of the court of law, and the cause of his imprisonment duly reviewed by the court. This writ was always effectual to rescue a man whose neck was in the halter."—2 *Hallam, Mid. Ag.* 75.

in a noted case:—"Liberty of the person is of all rights the most valuable, and of which above all others the law of England is most tender, and has guarded with the greatest care, having provided writs of several kinds for the relief of men restrained of their liberty upon any pretence by any power whatsoever, that so in every case they may have some place to resort to, where an account may be taken of the reason and manner of the imprisonment and the subject may find a proper relief according to the case. No crime whatsoever does put an Englishman into so miserable a condition, that he may not endeavour in the methods of the law to obtain his liberty, that he may not by his friends and agents sue out a *habeas corpus* and have the assistance of solicitors and counsel to plead his cause before the court where he is to be brought."[1]

General bearing of Habeas Corpus *Act on imprisonment.*—In order to comprehend the bearing of the *Habeas Corpus* Acts on liberty of the person, it must be remembered that in every municipal law there are certain known crimes, for which imprisonment is the appointed punishment; and as to which, imprisonment is also allowed in the stage preceding trial and sentence, for the purpose of safe custody. In this preliminary stage of what may be called arrest, bail is a natural and just mode of mitigating the hardship of the imprisonment, when safe custody alone is the object of it. Over and above these reasons for imprisonment, which, so far as civilisation has yet advanced, must be confessed by all to be still just and proper, there are also debts and breaches of civil contracts for which imprisonment is sometimes also allowed by most laws, either as a primary or substituted punishment. Therefore crime and debt are usually good reasons for imprisonment, provided a court is engaged in deciding upon, or has already decided upon the truth of the crime or debt. With these two cases no court ought to interfere; and it is by no means easy to enumerate all the crimes that have been settled and defined by law. But beyond these causes of imprisonment, and such as some statutes may authorise, there may be any number of arbitrary imprisonments for no cause whatever except the caprice of men in power; and as such cause, when it is no good cause, is generally concealed under ambiguous language,

[1] Aylesbury Case, 14 St. Tr. 867.

it is in this last class of cases, that the *Habeas Corpus* Act is brought to bear with effect. It compels every gaoler to produce the warrant of commitment; and if that warrant expresses no known crime or no legal debt or ground of imprisonment, then the prisoner must, as a matter of course, be released at once. It has already been stated how in the course of investigating the truth of allegations and charges of crime, the person charged comes to be imprisoned for safe custody; and in most cases during this preliminary stage, he is released on bail. As to debt, though there was once a mode of imprisoning debtors on a mere claim or charge of debt, before any trial and judgment of a court, that is now wholly abolished, except where the debtor has been sued and is about to leave the country. Unless imprisonment comes under one or other of these categories, it may be taken for granted that it is illegal; and hence the *Habeas Corpus* Act describes the machinery for exposing and putting an end to such illegality, and at once releasing the prisoner. With these preliminary observations it may now be stated more particularly, in what this machinery of *Habeas Corpus* consists, and how it is worked out.

Demand of warrant or commitment—The first step is for the prisoner, or some one on his behalf, to demand from the gaoler a copy of the warrant of commitment. If the gaoler or his deputy, or whoever keeps the prisoner, refuse to give it in six hours, he forfeits 100*l*., and on a second refusal he forfeits 200*l*.[1] But care must be taken to make the demand of the gaoler himself, if he is accessible, and not of a mere under-keeper.[2]

The application for the writ of habeas corpus.—Whenever a person is imprisoned on a warrant, which does not plainly express the ground to be felony or treason, but seems to describe some crime or supposed criminal matter as the cause of imprisonment, then an application may be made to any of the divisions of the High Court of Justice; and this application may be made not only by the prisoner, but by any one on his behalf. The application may also be made to the Lord Chancellor as well as to any of the divisions of the High Court, or, in vacation time, to any judge of the courts, on an affidavit verifying the facts and a copy of the warrant, or the fact that such was refused after

[1] 31 Ch. II. c. 2, § 5. [2] Huntley *v* Lascombe, 2 B. & P. 530.

request. If the judge refuse the writ of *habeas corpus* during the vacation between the sitting of the full courts, he forfeits to the applicant 500*l.*[1] If the judge grants the writ, he is to sign it.[2] The penalty for refusal, though confined to the refusal during vacation, is sufficiently large to arrest the attention of any judge; and indeed since the *Habeas Corpus* Act was passed, it is believed no instance has occurred of any blamable delay or reluctance of the judge to give the swiftest effect to every proper demand of an aggrieved prisoner, even at those times of the year when the above penalty is not applicable.

Foreigners may apply for habeas corpus.—In motions for *habeas corpus*, it is scarcely necessary to observe, that the distinction between foreigner and native is altogether immaterial. Every foreigner is a native, if he breathes the air of England. When the Hottentot Venus was exhibited in London in 1810, being a female from South Africa so named, who had a peculiar formation of person, and was supposed to be kept against her will for purposes of profit by those who had the apparent custody of her, Mr. Zachary Macaulay and other friends of the negro race applied for a *habeas corpus* to bring her up, in order to ascertain how far she was under any such compulsion. A rule preliminary to the writ was at once issued, and the court appointed officers to visit the female in the absence of her keepers, but yet in presence of third parties represented by them. And upon the report of those officers of court to the effect, that she came from Africa and was exhibited with her own consent, under a contract by which she was to receive a certain share of the profits, the rule was at once discharged and no writ was issued, because it was shown to be clearly superfluous.[3]

Habeas corpus *for parties charged with crime.*—Though the *Habeas Corpus* Act applies to all persons committed for criminal matters, except the warrant plainly expresses the ground of imprisonment to be felony or treason, yet the writ will not be granted where the party is undergoing his sentence on an indictment, according to the course of the common law, for this cannot in any sense be deemed

[1] 31 Ch. II. c. 2, § 10. [2] Ibid. § 3. [3] Re Hottentot Venus, 13 East, 195.

an illegal imprisonment.[1] The meaning of the word "crime" in the act has however caused some difficulty. And it is decided, that when justices convict and sentence to imprisonment, this is properly deemed a crime.[2] But where the party is committed for contempt of court, this is not deemed a crime, inasmuch as crimes are such offences only as are capable of being tried.[3]

To what class of cases habeas corpus *applies.*—The *Habeas Corpus* Act of 31 Charles II., applied only to those charged with crime, though the common law provided for all the cases. Yet the stringent remedies of the act were soon sought to be extended to all the other cases, so as to make the machinery more precise, and of universal application. In 1758 a person was pressed for the army and confined in Savoy, not for crime, but under an act to recruit the forces; and it was found that the *Habeas Corpus* Act did not meet his case. It was then proposed to extend the act to all persons confined for any colour or pretence whatsoever. But it was urged by some, that, though the act ought to apply to criminal charges, yet it ought not to apply to civil cases, else a wife or daughter may get freedom to rush to the arms of an adulterer or seducer, and an apprentice may desert his duties, and any person in an infected ship may insist upon being brought into the Queen's Bench and argue his right to liberty.[4] The opinions of all the judges were also taken in 1758 on a bill then pending, to extend the *Habeas Corpus* Act of 1678.[5] But the bill was not passed. Nearly sixty years later, however, namely, in 1814, a bill was brought in to extend the *Habeas Corpus* Act to cases of arrest other than criminal.[6] And in 1816 an act was at last passed, and it extended the same remedy of the prior act to all commitments other than for crime and debt. It also made some additions to the former act in treating wilful disobedience as a contempt of court, and making the writ more easily obtainable in vacation, and in binding over by recognisance those who refuse obedience to it.[7] The result now is, that in all parts of the year, whether vacation or

[1] Ex p. Lees, E. B. & E. 828. [2] Re Easten, 12 A. & E. 645. [3] Cobbett *v* Slowman, 9 Exch. 633: Re Cobbett, 7 Q. B. 184. [4] 15 Parl. Hist. 872. [5] Ibid. 903. [6] 29 Parl. Deb. 426. [7] 56 Geo III. c. 100.

not, the machinery for delivering a prisoner is always ready for action; so that it is a maxim familiar to all, that the courts will never sleep so long as wrong and injustice never sleep.

As the writ of *habeas corpus* meets all kinds of restraint of liberty by any authority whatsoever, it is sometimes resorted to by wives; or by parents to recover possession of children. In the case of Earl Ferrers, in 1758, Lady Ferrers, through her brother, obtained a writ of *habeas corpus* against the earl, under which she was brought into court, and then was allowed to exhibit articles of the peace against him for his violent conduct.[1] And in the case of another wife brought up, on its being proved that she was cruelly ill used, the court allowed her to go where she pleased.[2] In another case, in 1758, Wilkes obtained a *habeas corpus* to bring up his wife, who was alleged to be kept from him, and in restraint, by her mother; but on the wife being brought into court and satisfying the judge, that she was living apart under articles of separation, and was not against her will restrained by anyone, she was left to return to her mother's house.[3] And in 1761 where a wife was alleged to be confined by her husband's order in a madhouse, she was examined by order of the court as well as brought up, and on her being certified sane, she was at once released.[4] Again in another case of a woman confined in a madhouse, the court, on receiving affidavits showing that she was really insane, declined to issue the writ.[5] A *habeas corpus* is also the usual mode of a parent recovering possession of a child who is in the custody of the other parent; or as between parents or guardians and third parties when there is any wrongful custody.[6]

Writ of habeas corpus *not granted without leave.*—The writ of *habeas corpus* is not granted as a matter of course; or rather, it is not left to be obtained for the mere asking. As Wilmot, J., said, if malefactors under the sentence of death in all the gaols of the kingdom could have these writs of course, the sentence of the law might be sus-

[1] R. *v* Ferrers, 1 Burr. 6. [2] R. *v* Gregory, 4 Burr. 1991.
[3] R. *v* Mead, 1 Burr. 542. [4] R. *v* Turlington, 2 Burr. 1115.
[5] R. *v* Clarke, 3 Burr. 1362. [6] R. *v* Greenhill, 4 A. & E. 624; R. *v* Dobbyn, 4 A. & E. 644.

pended, and perhaps totally eluded.[1] It would do no good to bring a malefactor from Cornwall or Northumberland, if the court knows that he must only be remanded when brought before it. The writ must in all cases be granted on motion, in other words, the leave of the court must be obtained on an affidavit as to the facts. And the judges justified this practice on the ground, that there are many kinds of restraints, some in the nature of punishments in domestic government, such as take place in the case of husbands, fathers, guardians, and masters. The law authorises such restraints in order to the performance of natural, moral, and civil duties by wives, children, wards, and apprentices. This kind of authority cannot be broken in upon wantonly, upon mere suggestion, and without seeing some reason for an interposition, otherwise disobedience and rebellion in private families would be encouraged. It would create a scene of disorder and confusion, if all the wives, children, wards, and apprentices in the country, or any person in their name, could without any cause shown, force their production in Westminster Hall before a judge, or wherever he should be, with the risk of such persons being rescued whilst *in transitu.* Besides the domestic relations, there are paupers in hospitals and workhouses, madmen in asylums. It would never do to let all these people loose. Suppose one of the crew performing quarantine were to insist on his writ, it might spread frightful pestilence and death, if it were granted of course. In one case a husband applied for a *habeas corpus,* directed to his wife's mother, to bring up his wife, whom she detained. And when the parties came before the court it appeared that there had been articles of separation, under which the wife was entitled to live separate; and on that being shown the court refused the writ, holding that it would never have been granted, if the facts had been stated in the first instance.[2] Acting on these views, the court, on the first application on motion, has refused the writ, for example, when a person applying in 1751 was a prisoner of war taken on board an enemy's prize.[3] But it is not the less a writ of right, though this preliminary leave is required, for the leave is

[1] Wilmot, Op. 88. [2] Ibid. 93. [3] R. *v* Schrever, 2 Burr. 765.

merely for the purpose of sifting frivolous from genuine applications.[1] At one time it was supposed, that though in term time the writ was only grantable on motion, yet that in vacation no such leave was required, and that a judge, under the terror of a penalty of 500*l.*, must issue it; but that notion was corrected in 1820. In vacation as well as term time this leave is required.[2]

Habeas corpus *writ granted in vacation.*—As already stated, the writ may be applied for in vacation as well as in term time. The Lord Chancellor decided, that he could at common law, irrespective of the *Habeas Corpus* Act, issue this writ in vacation.[3] And any judge of the High Court may do the same, whenever the warrant of commitment is for crime[4] or for any other matter, except debt or civil process.[5] And in these cases also the writ may issue under the common law. The writ may thus be issued in vacation by the judge requiring an immediate return before himself at chambers;[6] unless term intervenes, in which case the return may be made in term; or the writ may be made returnable before another judge.[7] If the prisoner is not confined for debt or crime, and the application is made during vacation, and the writ is returnable immediately, then to disobey it is a contempt of court, which may be punished as such.[8] If the application is made in vacation, and the return is in term, the same proceeding is competent, and the same time is allowed for the gaoler to produce his prisoner.[9] And the judge is bound within two days, after return, if the offence is bailable, to discharge the prisoner, taking recognisance and sureties for his appearance at the next term or next sessions for trial.[10]

Gaoler is to make a return to the writ.—When the writ is obtained and served on the officer or left at the gaol, he is bound within three days after service to bring the prisoner before the judge or court. He is entitled to a previous tender of the expenses, and these are also defined by the statute, for bringing the prisoner to the judge; and he is entitled to security for the expenses of

[1] Wilmot's Op. 81. [2] Hobhouse's Case, 3 B. & Ald. 420. [3] Crowley's Case, 2 Swanst. 1. [4] 31 Ch. II. c. 2. [5] 56 Geo. III. c. 100, § 2. [6] Watson's Case, 9 A. & E. 745. [7] Wilson's Case, 7 Q. B. 984. [8] 56 Geo. III. c. 100, § 1. [9] 31 Ch. II. c. 2, § 3. [10] Ibid.

taking the prisoner back. If the prisoner be confined at a place between twenty and 100 miles from the judge, the gaoler is allowed ten days, and if more than 100 miles ten to twenty days; but such a delay seldom occurs.[1] The gaoler is also to certify the true causes of the imprisonment. If the officer refuse to make the return and bring the body, he forfeits 100*l.* for the first offence, and 200*l.* for the second.[2] Or instead of this forfeiture the officer may be dealt with for a contempt of court.[3] And the court will not accept a return, which is equivocal and evasive. Thus where the person made a return, that, at the time of receiving the writ and since, "he had not the body," this was deemed evasive, and an attachment was ordered to issue for contempt. The general form of return which is satisfactory is, that the party "has not the person in his possession, custody, or power," these latter words implying that he has neither the custody nor can in any way influence it.[4] If the warrant of commitment is bad through some defect, the court will allow the gaoler to substitute a better one.[5]

If the return can be contradicted by affidavit.—The return is taken to be true *primâ facie*, and need not be supported by affidavit unless impeached.[6] The rule at common law, independent of the statutes, seems to have been, not to allow the return to be contradicted, but to leave the party to bring an action for a false return;[7] but in modern times the return may be quashed, on showing its falsehood by affidavit, on application for an attachment.[8] If the application for the writ was made under 31 Charles II., affidavits in answer to the return were not expressly authorised, and are not allowed; but these were allowed under 56 George III. c. 100. Therefore the incompetency or competency to contradict the return depends on whether the writ is issued under the act of 31 Charles II. or not. If it is not, then affidavits to contradict are allowed.[9] Thus where one was detained for debt, he was allowed to show that he was privileged from arrest,[10] or was arrested on Sunday, and so

1 31 Ch. II. c. 2, § 2. 2 Ibid. § 5. 3 56 Geo. III. c. 100, § 2.
4 R. *v* Winton, 5 T. R. 89. 5 Ex p. Smith, 3 H. & N. 227.
6 Watson's Case, 9 A. & E. 794. 7 2 Hawk. P. C. c. 15, § 71.
8 Watson's Case, 9 A. & E. 794. 9 Ex p. Beeching, 4 B. & C. 136.
10 Ex p. Dakins, 16 C. B. 77.

the arrest was void.[1] And it is not deemed absolutely necessary that the defendant or gaoler shall be present in court at the return.[2]

What is done under the writ with the prisoner.—It was formerly the practice in all cases to bring the prisoner into court; and this is so still, where the validity of the commitment is to be discussed.[3] But when it appears that the court would bail the prisoner, it may direct the depositions to be taken before justices in the locality where he is confined.[4] In those cases where a prisoner is confined under some conviction of justices or inferior tribunal under a commitment, which is supposed not to be made by a competent jurisdiction, the High Court will not minutely inquire into the grounds and merits of the decision; but will merely see that the committing authority had requisite jurisdiction, since every court must be taken to be competent to know the law it administers;[5] especially if the party may obtain adequate redress by writ of error or *certiorari*.[6] If the warrant shows no offence or ground of imprisonment known to the law, then the prisoner will be discharged.[7] But if the depositions show that there are materials for a charge and conviction, the prisoner will be remanded to custody, in order that the charge may be inquired into in due course.[8] In cases of imprisonment not for crime or debt, when the return is made and it seems good and sufficient in law, yet if the facts appear doubtful, the judge may bail the prisoner, and take his recognisance to appear in the following term before the court and abide the order of such court.[9]

If a prisoner has been once set at large on his *habeas corpus*, he cannot be again imprisoned for the same offence, unless a court has made a valid order, or issued process to that effect, and has jurisdiction to do so; and to act knowingly in contravention of this enactment is to forfeit 500*l*.[10]

All prisoners for crime entitled to early trial.—Though a person committed for treason or felony cannot be brought

[1] Ex p. Egginton, 2 E. & B. 717. [2] Re Hakewill, 12 C. B. 228. [3] Ex p. Martins, 9 Dowl. 194. [4] R. *v* Jones, 1 B. & Ald. 209. [5] Wilson's Case, 7 Q. B. 984. [6] Re Chaney, 6 Dowl. 281. [7] Ex p. Bissett, 6 Q. B. 481. [8] R. *v* Marks, 3 East, 157; Ex. p. Kraus, 1 B. & C. 258. [9] 56 Geo. III. c. 100, § 3. [10] Ibid. § 6.

up on *habeas corpus*, yet every prisoner for crime is entitled to an early trial, and if he is not indicted the next term, or sessions, or assizes after his commitment, he may be set at liberty on bail, unless the judge think the prosecutor's witnesses could not be ready. If he is not indicted the next following term, or assize, or sessions, he is entitled to be absolutely discharged.[1] In this way, however properly a prisoner may be committed for some criminal offence, yet he is not allowed to be kept beyond a very short time before he is brought to trial; and he may insist on such early trial, whatever may be the cause of delay.

Evading the Habeas Corpus *Act.*—Hampden said there were ways of evading the *Habeas Corpus* Act, as when a man was to be bailed at 40,000*l.* instead of 4,000*l.*[2] But this source of danger is all but visionary, and to exact excessive bail was declared by the Bill of Rights to be punishable as a misdemeanour.[3]

Habeas corpus *suspended by Act of Parliament.*—The writ of *habeas corpus* is thus an integral part of the British constitution, and as was once said, the clearing of such a matter has redeemed the body of liberty. The Act cleared the air for all time to come. No subject, no government can resist its efficacy. The process of the court can penetrate the deepest dungeon and the most sequestered cloister, and the innermost chamber of the most powerful subject. It would be idle for anyone to dream of baffling it, and with the help of that universal light created by a free press and an ever ready sympathy against all kinds of oppression between subject and subject, between subject and government, each citizen feels as secure as any settled order of society yet known to mankind has ever witnessed. The efficacy of the process can only be suspended by an act of parliament; and so great is the reluctance to ask, or the desire to concede this extreme measure, and thus create a dictator, that only one or two instances, and those of short duration and caused by extreme pressure, have occurred of the suspension of the *Habeas Corpus* Act since the Act of 1679 was passed; and the longer it exists, such occasions seem less and less likely to recur.

[1] 56 Geo. III. c. 100, § 7. [2] 5 Parl. Hist. 269. [3] 1 W. & M. s. 2, c. 2.

CHAPTER VIII.

PUNISHMENT OF THE BODY ON FINAL JUDGMENT OR SENTENCE.

Punishment of the body generally by way of legal redress.—The unanimity with which various ages and all countries have gradually come to treat the body as the chief basis of redress for every misdeed, fault, or inattention, which the law thinks fit to notice, point this out as one of the laws of nature. If a man has borrowed money, and will not repay it; if he has stolen a horse, murdered a citizen, or assaulted a neighbour; if he has cheated his creditors, refused to marry, or to serve as a parish constable, or has run over a passenger, has committed perjury, or been found begging, and a hundred other things, he is, or has often been, as a consequence, punished with some bodily pain. He has either been hanged by the neck till he was dead, or had a right hand cut off, or a few fingers; or had his ears bored, or has been burned in the cheek, or put in the stocks, or has been whipped at the cart's tail; and in some way has had to suffer in person for what was thought or declared to be amiss. All the changes have been rung on this bodily pain; the body, in some shape, has been made either firstly, secondly, or thirdly, the sole paymaster for all the wrongs that the law has counted up.

The Chinese code, at one time, seemed to treat all kinds of misunderstandings between man and man, as if they could be equally well set right by a hundred or more strokes of the bamboo, as a fitting universal remedy. All wrongs and delinquencies, all omissions, negligences, nonpayments, torts, breaches of contract, contempts of court, all violations of civil, criminal, ecclesiastical, public, and private law, except the most heinous crimes, resolved themselves into

a certain number of strokes of the bamboo; and when these were administered, things went on as if nothing had happened, and amicable relations with all mankind were resumed. The body has for some reason or other, at least after barbarism has vanished, been universally selected as the primary fund to draw upon, and as yielding the best solution that human ingenuity has devised. Why that is so, no philosopher has ever explained. If there is any logical connection between assaults and murders on the one hand, and corporal punishments of the wrongdoer on the other hand, it is at least difficult to see any such logical connection between nonpayment of debt, and shutting up the debtor in prison. Yet the world has long acted as if it did see a close and meritorious connection of cause and effect in these two facts; and so long as the one follows the other, all mankind seem satisfied. The *lex talionis*, indeed, has been found defective as a rule, even in cases of maimings and woundings, as was formerly pointed out; and yet all courts have fallen back on one generic form of bodily punishment as the final winding up of accounts, and as enabling both the parties concerned in any difficulty to turn over a new leaf. The only other satisfaction for legal irregularities—the only other sanction has been the deprivation of such property as the delinquent may have accumulated, it being deemed almost as effective a process to strip him of his property as to mangle or macerate his body. And this compulsory deprivation of property, instead of being a refinement or secondary punishment, seems to have been the oldest and primary basis of legal redress. Which of these two alternative punishments, came first in the order of laws can scarcely admit of much doubt. Bodily punishment seems the result of second thoughts. But, however that question may be resolved by the learned, the punishment that consists in taking one's property away by force belongs to another division of the law, entitled "the Security of Property," which at present does not concern us. All that we now require to investigate are the various modes of bodily punishment, which are in vogue as a means of legal redress—as that kind of temporal sanction, which is the terror of all, and which all reasonable creatures are

presumed to be most disposed to avoid if they can. It is for fear of it, that they are led to make up their minds to abstain from doing illegal acts, and so, by a reflex process, to grow into perfect citizens. All the kinds of bodily punishment, from hanging and death, to imprisonment, may be said to be appointed for two main reasons, namely, either to extinguish and satisfy debt or crime. Nearly all civil laws end in a claim and decree of debt, though in modern times a fine is often preferred. It is necessary first, therefore, to notice how far bodily punishment is the appointed legal redress for debt.

Object of punishment of the body.—What is the precise object which the law has in view in decreeing bodily punishment at all, has been variously answered. Windham observed that it was well said, that a man was punished, not because he had stolen a horse, but that horses might not be stolen.[1] The law of Moses treated punishment as a deterrent, and said nothing of the amendment of the criminal.[2] The Stoics, adopting the paradox of Plato, which was also the favourite thought of Marcus Aurelius, that all guilt is ignorance, treated it as an involuntary disease, and declared that the only legitimate ground of punishment is prevention.[3] Plato himself viewed punishment as chiefly for expiation and for purification.[4] And the ancient Egyptians were said to have viewed punishment as not only a means of preventing repetition of crime, but of reclaiming the offender.[5]

Early practice of payment for crimes.—However surprising it may seem to modern eyes, accustomed to distinguish crimes so sharply from mere civil debts and wrongs, such a distinction is not self-evident to barbarian minds. Crimes were in Central Africa always allowed to be paid for.[6] In Benin, if no money could be got, then corporal punishment was substituted.[7] In China it was said at one time, that all might redeem themselves from punishment, except in capital cases, by paying a small fine.[8] And in Greece the Areopagus was said to be the first court that ever entertained questions of life and death,

[1] 35 Parl. Hist. 393. [2] Deut. xvii. 13. [3] Sen. De Ira, i. 14; Arrian, i. 18; ii. 31. [4] Lerminier, Introd. a l'Histoire du Droit, p. 123. [5] Wilk. Anc. Egypt, c. 3. [6] Livingst. Zamb. 140. [7] 6 Univ. Mod. Hist. 583. [8] Staunton, Code Chin.

the earlier courts having imposed on the most atrocious criminals nothing heavier than a fine.[1] Other instances of the same ancient practice have already been noticed in another place.[2]

Is there a punishment at common law.—Though for the most part, since statutes began, a definite punishment is assigned for each particular crime, yet it has been sometimes difficult to trace any specific punishment for some crimes, and hence the question has arisen, whether there is anything that can be called a common law punishment for crime. It was said, that all the judges had met in 1689 and unanimously agreed, that, where the subjects were prosecuted at common law for a misdemeanour, it was in the discretion of the court to inflict what punishment it pleased, not extending to life or member.[3] And this seems to be accepted as the current doctrine.[4] It is difficult, however, to conceive by what mode of reasoning this conclusion could be arrived at, for the light of nature can scarcely be supposed to point out a normal punishment, whether imprisonment or fine. And yet it is fortunate, that while the Jewish Sanhedrim discovered their common law punishment to be scourging, in our courts two hundred years ago, and perhaps longer, the least cruel of bodily punishments, namely, simple imprisonment, instead of cutting off the right hand or branding the cheek, was conceived to be the standard punishment for the minor crimes. And probably some might even now think it judicious to have a maximum punishment fixed for all such indeterminate offences. In 1827 a statute enacted, that, if no punishment had been or thereafter should be assigned to a felony, then the punishment was to be seven years' transportation or two years' imprisonment; and if a male, three whippings besides might be added.[5] And that part of the

[1] 1 Mitf. Gr. 381.

[2] See *ante*, vol. i., pp. 292, 385. Among the Kaffirs there is no personal punishment for any crime, but fines and confiscations only, though witchcraft is subjected to capital punishment and torture.—*Maclean's Kaffirs*, 29, 36. The ancient Germans admitted of none but pecuniary punishments, that their blood might not be spilled except with the sword in hand. The Japanese, on the other hand, rejected fines, because the rich can elude the punishment.—*Montesq*. b. vi. c. 18.

[3] 1 Lords' Deb. 374. [4] R. *v* Thomas, Cas. t. Hard. 279. [5] 7 & 8 Geo. IV. c. 28, § 8.

sentence consisting of transportation is now converted into penal servitude for the same period.[1] And in 1823 several misdemeanours of a disgraceful character, some of which have been included in subsequent statutes to the same effect, were expressly made subject to imprisonment with hard labour.[2]

Imprisonment of the body only.—But the least painful of all bodily punishments is undoubtedly imprisonment, which consists in a restraint of the body within four walls in a limited space, during which period food is supplied, and no further pain than what consists in the deprivation of locomotion is inflicted. Yet even imprisonment, pure and simple, was looked on with horror by the champions of liberty at the time of the Commonwealth, and they gave it the most odious of names. Coke said imprisonment is accounted in law "a civil death, when a man is deprived of society, of wife, house, country, friends, and liveth with wicked and wretched men." [3] And Cook, an intrepid advocate, who prosecuted Charles I., described imprisonment as "a punishment, whereby a man is buried alive, loses the comfort and benefit of his five senses, and is made *corpus immobile legis*, the immovable subject of the law, as a dead carcase. It is true, that in itself it was the easiest of all corporal punishments, but the continuance of it makes it such a lingering consumption, that it is better to be upon the rack an hour, than to be imprisoned a year, as it is better to be once wet to the skin, than to be subject to a perpetual dripping; especially for an active spirit there is no such torment as to deprive him of his liberty, for active Theseus was condemned only to sit still; there is no end of such a misery." [4]

This mildest of bodily punishments had long been the universal and ready resort for all who sought to recover payment of debt. And though in very recent times such mild punishment has been all but abandoned as untenable even in our clean and wholesome gaols, because unnecessarily harsh, and altogether unfit to restore that which was lost, yet it is singular how much more severe, savage, and relentless were the punishments of the ancients for all money matters.

[1] 20 & 21 Vic. c. 3, § 1. [2] 3 Geo. IV. c. 114. See *post*, p. 268.
[3] 2 Inst. 52. [4] 3 St. Tr. 1352.

Ancient cruel punishments for debt.—According to the Mosaic law, if a debtor could not pay, he and his wife and children could be sold by the creditor as slaves, but they were not allowed to be imprisoned for life; indeed, a Jewish slave attained his freedom in the sabbatical year, which occurred in every seventh year.[1] The compulsory bond-service of the debtor tended to wipe out the debt; but mere imprisonment of the person was unthought of as a remedy, though at the Christian era this practice seems to have crept in.[2] The ancient Irish law also made the defaulting debtor a slave to the creditor.[3] It was also so in Ava;[4] and so it was in comparatively recent times in the Duke of Muscovy's territory.[5] The ancient Egyptians (who were followed by Solon) had a law, that a creditor was not to seize a debtor's person for debt, but could only take his goods, leaving, however, his tools and implements, for it was deemed unjust to deprive debtors of the means of maintaining their families.[6] In some parts of India a far-fetched remedy was resorted to. When a creditor wanted payment of his debt, he could sit down before the tent of his debtor and strictly fast, in which case the debtor was compelled to fast also and abstain from all occupations and amusements. The sin of the creditor's perishing would then, it was thought, fall on the debtor. This dual punishment, called "dharna," was itself made punishable in 1820.[7] And some law of the same kind was included in the ancient Irish or Brehon law of distress.[8] Solon was said to have mitigated the law, which existed before his day, as to making a debtor a slave of the creditor;[9] and he forbade the creditor to seize the debtor's body for debt. But the Roman decemvirs preferred the old law, which enabled the creditor to seize and make a slave of the debtor and keep him in the creditor's house in irons, till frequent cruelties led to a change in such practices.[10] Montesquieu said, the law of the Twelve Tables, which allowed the creditors to divide between them the debtor's body, was by some not literally interpreted, but meant only to point to

[1] Michaelis, art. 147, 148. [2] Math. xviii. 30; v. 26. [3] 2 O'Curr. 29. [4] 3 Univ. Mod. Hist. 279, [5] 1 Pink. Voy. 21. [6] Wilk. Anc. Egypt. [7] Instit. Menu, c. 8, § 549; 1 Strange, Hind. L. 308. [8] 1 Anc. Laws Irel. 46 Introd. [9] Diog. Laert. b. i. Sol. [10] Dion. Hal. b. v.

an equal division of the debtor's goods. Others say it was only a milder form of the older and harsher law, which made the debtor a slave of the creditor, and at his absolute disposal.[1] But the law, as it was, was defended as supplying a wholesome terror against recklessly incurring debts that one could not pay.[2]

Ancient English punishment for debt.—On looking at the ancient law of England, we find traces of the same ideas. Coke said the common law knew nothing of imprisonment for debt.[3] And it was provided by Magna Charta, that no one should have his lands taken for debt, if the goods sufficed,[4] showing also the superiority of land to goods in the estimation of the owners of that day. The idea of seizing and imprisoning the body of the debtor at random seems not yet to have clearly dawned on the legislative mind, and Coke said that it was the king who was thereby restrained from seizing the debtor's land, but that he could seize the person.[5] In the time of Edward I., however, the Statute of Merchants provided, that the debtor's goods might be seized to pay his debts, and if these were insufficient, then the debtor's body might be imprisoned, till he or his friends paid the debt; and if he had no money on which to live in prison, then the creditor was to find him in bread and water, the cost of which was to be repaid before his release.[6] It was shortly afterwards added, that if the goods did not suffice, the lands of the debtor might be taken; but in that case the debtor's body

[1] Butl. Rom. Law.

[2] Aul. Gell. b. xxii. c. 1. In Korea a debtor who did not pay was beaten on the shins till he found the means to pay; and if he died without payment, his nearest relatives suffered the same punishment, so that nobody ever lost his money.—7 *Pink. Voy.* 539. In Tong King the debtor was seized and starved, and overworked, and beaten till he paid the debt; and sometimes a heavy clog was chained to his leg, or a wooden collar put round his neck for a certain time.—3 *Univ. Mod. Hist.* 449. In Russia the debtor was beaten on the shins once a day, and that, whether rich or poor, whether a woman or a man.—13 *Ibid.* 63. In Malabar the creditor drew a circle round the debtor, who dared not move beyond it till the debt was paid.—3 *Ibid.* 171. In Pegu the creditor could possess himself of the debtor's wife, in which case, however, the debtor was completely discharged. —7 *Ibid.* 128.

[3] 2 Inst. 394. [4] Mag. Chart. c. 9. [5] Co. Litt. 19 1a. [6] 11 Ed. I. Stat. Merch.

could not be taken also.[1] Yet the debtor's body at last was given too.[2] Three centuries later the arbitrary choice of the creditor was to some extent controlled. If a debtor was confined in prison for six months, and he made oath that he had no property, the justices had power either to discharge him without a fee; or if the creditor wilfully refused, then he was made to pay a weekly sum for the debtor's support.[3] And the law went on steadily relying on this expedient of imprisonment for debt. As a judge of the last century well expressed its *rationale*, "the creditor expected to torture the compassion of friends, and by that means extort payment from those who were not bound for the debt. For the want of money, which he had not got, the debtor was locked up in idleness, and his existence rendered insignificant, if not inimical, to the public good." [4]

The mode in which imprisonment was complacently viewed about 1729 was thus expressed by Page, J.:—"A prisoner for debt was only taken like a distress, and kept there, till he or his friends for him could pay the debt. Imprisonment was no punishment, it was not taken as part of the debt; but if he had effects, these were answerable for it. He was kept only in such a manner as he might be forthcoming and safe. This being the case, he was to be kept in a becoming way, so that the warden may be safe and the prisoner forthcoming, but in no other degree. The prisoner should not be punished by any unreasonable restraint. He is not to be punished in gaol, but to be kept safely. Imprisonment for debt is no torture, no ill usage, no duress; nothing but what is fit and decent."[5] This ingenious refinement about imprisonment being no punishment, but a mode of keeping safe the debtor and concussing him and his friends, was a gloss, which in modern times cannot be accepted, however elementary a proposition it might have sounded to the oracles of the law in 1729.

The law of imprisonment for debt, which existed so long in England, the land of freedom, whereby a creditor enforced payment of debt by imprisoning his debtor for

[1] 13 Ed. I. Stat. Merch. [2] 25 Ed. III. c. 17; Co. Litt. 191 a; Butl. note. [3] 22 & 23 Ch. II. c. 20; 30 Ch. II. c. 4; 2 W. & M. Sess. 2, c. 15; 5 & 6 W. & M. c. 8; 7 & 8 W. & M. c. 12. [4] R. *v* Duffin, 22 St. Tr. 334. [5] 17 St. Tr. 355; Flet. 38; Bract. 105.

unlimited periods, is perhaps the most irrational that ever existed; even the ancient law, which made the debtor the slave of the creditor, far excelled it, for by compulsory service the slave might work off his debt at least in part, but by the other process this was simply impossible. And to concuss an unwilling debtor to pay by punishing his body tended only to exasperate him all the more. The law should have directed its whole energies towards the compulsory seizing of the debtor's property if he had any, and if he had none, then by limiting the imprisonment and keeping some hold over his future acquisitions.[1]

And what made the practice of imprisonment for debt still more scandalous was the total want of care taken by the law, or the legislature, of the health, morals, or reasonable comfort of the prisoners; the creditor in some cases finding them in food to a small extent only.[2] Debtors were cooped like rats, rotting and starving, the prey of fever, hunger, cold, of the immorality of numbers closely crowded, of the brutality, and tyranny, and extortion of gaolers. Such a mode of legal redress, however, had long continued, and might have continued for ever, so far as the law was concerned, had it not been for Howard the philanthropist—a man of gifts almost divine, and the glory of his race. He it was, who first taught the nations the duty of humanity towards even the most destitute and degraded of beings—and showed how no debt was so great, no crime which could be named so foul, that the gates of mercy should be wholly shut on mankind.[3]

The glimmering of a reform, after great delay, was descried. In 1812 a court was constituted for the express

[1] In 1729, Lord Strafford told the House of Lords, that the English law was worse than that of the Turks, for debtors were released in Turkey after nine months, if they gave up all the property they possessed, whereas in England, as Lord Townshend said, they were kept rotting in gaol.—8 *Parl. Hist.* 689. Burke, in 1791, said prisoners for debt were in reality slaves.—29 *Ibid.* 513.

[2] 32 Geo. II. c. 28.

[3] The purposeless cruelty of imprisonment for debt was demonstrated in 1792, when a woman died in Devon gaol, after forty-five years' imprisonment for a debt of 19*l*.—47 *Com. Journ.* 647. And when the Thatched House Society set to work to ransom honest debtors by paying their debts, they, in twenty years, released 12,590 at a cost of 45*s*. per head.—*Rep.* (*H. C.*) 1792.

purpose of relieving debtors unable to pay their debts, yet willing to relinquish all their property for general distribution.[1] In 1838 the indiscriminate and oppressive mode of arresting debtors on mesne process, or in the stage preliminary to final judgment, and compelling them to remain in prison unless they gave bail, was abolished; and the practice restricted to those cases only, where the debtor was about to leave the country, and owed a sum not less than twenty pounds.[2]

For what debts imprisonment is still competent.—In 1869 the practice of imprisonment for debt was substantially abolished, except in a few cases only, namely, those cases which have somewhat of a criminal aspect. Thus when a penalty other than one for breach of contract is due, or is one recoverable summarily before justices of the peace; or when a trustee or person in a fiduciary capacity has failed to pay a sum in his possession or under his control, and which he has been ordered by a court of equity to pay; when a solicitor as an officer of the court has failed to pay a sum when ordered by the court to do so; when a bankrupt or insolvent has failed to pay a portion of a salary or income which he is ordered by a court of bankruptcy to pay to his creditors; or when a debtor has been ordered to pay in those cases where a court will in its discretion make such order to pay—in all these cases imprisonment for debt is retained. But even in these cases imprisonment now shall never exceed a longer period than one year.[3] This, therefore, is the worst that can now happen to any man, who cannot pay a debt, however large.

The object of this Debtors Act was to relieve from imprisonment for mere poverty as distinguished from misconduct.[4] In defining still more precisely what are the debts which still justify imprisonment, inasmuch as they are excepted impliedly or expressly from the above general enactment, it is found, that debtors to the crown are still liable to be imprisoned;[5] and for crown debts imprisonment is said to be indefinite.[6] Among the debts also

[1] 53 Geo. III. c. 102. In the thirteen years following this act 50,000 prisoners were set free.—*Ret.* (*H. C.*) 1827. [2] 1 & 2 Vic. 110. See *ante*, p. 134. [3] 32 & 33 Vic. c. 62, § 4. [4] Re Hope, 7 Ch. App. 525. [5] Att.-Gen. *v* Edmunds, 22 L. T., N. S. 667 [6] 6 Parl. Deb. (3rd) 1702.

described as still authorising imprisonment, the costs awarded by courts of quarter sessions and enforceable by commitment are included.[1] And though a trustee may be imprisoned for not paying money, which he has misapplied, yet he cannot be imprisoned merely for the interest due upon it.[2] Whenever a solicitor is found on taxation to owe a sum as solicitor, he may be imprisoned for non-payment, but not when he owes the money in the capacity, not of a solicitor, but only of a litigant.[3] And when a person is imprisoned for contempt by the High Court, this is in no sense an imprisonment for debt, though the origin of the contempt may be such that the prisoner may at once effect his release by paying a sum of money, and the non-payment of which was the cause of the committal; or even though he may have no means whatever, which can enable him to pay his way out.[4]

Imprisonment for small debts under fifty pounds.— Though the general rule now is, that no person can be imprisoned merely for non-payment of a debt, except where justices of the peace have jurisdiction to enforce it, and except in the other cases specified, there is one exception in which both the superior courts and the county courts may still authorise imprisonment, namely, for debts under fifty pounds. In all debts under that amount the imprisonment cannot exceed six weeks, but it is not a satisfaction of the debt. The imprisonment is not a matter of course, but the jurisdiction can only be exercised through the medium of a summons, under which it must be proved to the satisfaction of the court or judge, that the debtor either has, or has had since the date of the order or judgment, the means to pay the debt, and has refused or neglected to pay it. The proof of such means must be given by affidavit; and the judge or court may compel the attendance of witnesses in reference to this subject matter.[5] In all such cases the court may order payment of the debt by instalments; and may from time to time rescind the order, and at any time the debtor can obtain his discharge by

[1] R. v Pratt, L. R., 5 Q. B. 176. [2] Middleton v Chichester, L. R., 6 Ch. Ap. 152. [3] Jenkins v Fereday, L. R., 7 C. P. 358; Re Hope L. R., 7 Ch. Ap. 593. [4] Re M., 46 L. J., Ch. 24. [5] 32 & 33 Vic. c. 62, § 5: Rules of Court, 1869.

payment of the debt and costs, if any.[1] There is thus a marked distinction drawn between debts above and debts below fifty pounds, imprisonment being generally incompetent in the former case, and generally competent in the latter case. It is essential that the committal by a county court, where these small debts are mostly recoverable, should be exercised only by the judge or his deputy, and by an order made in open court, and showing on its face the ground on which it is issued. And the county court judge can only commit a debtor in respect of a judgment of a county court; or if the judgment is that of the High Court, then the debt must not exceed fifty pounds.[2]

The result of the enactments is, that no person can now be committed to prison for non-payment of any debt except in matters quasi-criminal or of trust, and except in small debts it be shown that he has, or has had since the date of the judgment, the means of payment, and has refused or neglected to pay; and in all such cases he must be previously summoned to show cause before a judge, why the order of committal should not issue.

Officer arresting debtors for debt. — When a judgment of debt has been signed and execution issued, which execution consists in arresting the judgment debtor, the general rule is, that none but an officer of the law can arrest one for any debt or civil demand. And though the sheriff and his bailiffs, or at least some statutory bailiffs, are the ministerial officers, whose duty it is to execute process of arrest issuing out of courts of justice, yet sometimes the sheriff may nominate a special bailiff for the purpose, who is not a regular officer, but is employed only for the occasion, and generally at the risk of the party who nominated to such employment. And though in civil actions imprisonments are rare, yet there are occasions in the course of a suit, in which a party may have committed a contempt, so as to justify an attachment or arrest, but that is on another ground. In all the cases, however, the rule is still the same, that an arrest on account of any civil proceeding is effected by a regular officer of the court.

Resisting arrest under civil process for debt.—The usual

[1] 32 & 33 Vic. c. 62, § 5. [2] 32 & 33 Vic. c. 62, § 5; Rules of Court.

occasion on which the arrest of a person in civil actions is resisted is, because of some supposed irregularity in the process itself or in the mode of executing the authority it confers, that is to say, in carrying out the arrest. No court can administer justice effectually without having the power of enforcing its orders by arresting persons who neglect or disobey; but there is a regular way of performing this delicate business, which ought to be scrupulously adhered to, and it is because of the occasional deviations from this regular course that disputes used to arise, and assaults or murders used to be committed, sometimes under strong provocation, and very frequently with faults on both sides. With regard to the regularity of the process or warrant authorising an arrest, the party arrested has a right to know on what ground and by whose authority his liberty is invaded. When he is duly informed of these particulars, it is his duty to allow himself to be taken into custody without any resistance, and to await the further action of the court, by whose authority he has been arrested. And, as may be supposed, there are sound objections as well as frivolous objections to the regularity of the process. To know which is which, and to act accordingly, requires much judgment; and it is scarcely now, owing to the few occasions of arrest in civil cases, requisite to attempt to describe all these minutely.

A debtor's house is his castle against civil process.—One fundamental rule in executing civil process is, that every man's house is his castle, and no bailiff has a right to break open the outer door to arrest the occupier as being his debtor.[1] And the Romans had the same rule as to his own house being an asylum to the debtor.[2] A lodger's room in a house is, however, not in this enviable condition of being a castle; and if the bailiff has got into the outer door of the house, he may break open the inner lodging without any further ceremony than first asking admission and being refused.[3] And the bailiff may, in all cases, go into the castle, if he can lift the latch and let himself in at the outer door without violence, —entering merely as other visitors usually do.[4]

The reason why a man's house was called his castle, so

[1] East, P. C. 323. [2] ff. 2, 4, 18; Montesq. b. xxix. c. 10.
[3] Lee v Gansel, 1 Cowp. 1. [4] Ryan v Shilcock, 7 Exch. 72.

that the outer door could not lawfully be broken open under any process for debt, was stated by Lord Mansfield to be this :—"Otherwise the consequences would be fatal, for it would leave the family within naked and exposed to thieves and robbers. It is much better, says the law, that you should wait for another opportunity than do an act of violence, which may probably be attended with such dangerous consequences. And as this is a maxim of law in respect of political justice, and makes no part of the privilege of a debtor himself, it is to be taken strictly, and not to be extended by any equitable analogous interpretation."[1] Another and shorter reason, however, is, that as a man's occupation and home are everything to him, nothing in the shape of any breach of contract which he may have committed is of sufficient importance in comparison, so as to allow his adversary to disturb him there for such a reason. But whatever be the ground, the law seems to have grudgingly recognised the exemption, and treated it as a privilege; and Foster said "the law had gone far enough in allowing it, and it ought to be confined to the breach of windows and of outer doors, intended for the security of persons within against persons without."[2] Indeed, Popham seemed to think there ought to be no castle at all; and that this fine figure of speech was nothing but a hindrance to justice.[3] Coke's reason for the same rule of law somewhat differs from Lord Mansfield's, and depends rather upon a subtlety. He says :—"The law doth abhor destruction or breaking of any house which is for the habitation and safety of a man, by which great damage and inconvenience may follow to the party, when no default is in him ; for perhaps he doth not know of the process, which, if he hath notice of, it is presumed that he will obey it."[4]

Yet, however specious may be this rule, that an Englishman's house is his castle, it has in practice sometimes been reduced to a very shadowy advantage. In one noted case bailiffs had been watching day after day to get inside a debtor's house, and at last they saw an upper window open. One of the bailiffs brought a ladder and put it up

[1] Lee v Gansel, 1 Cowp. 1. [2] Foster, C. L. c. 8, § 20. [3] Semaine's Case, 5 Co. 93 ; Yelv., Eliz. 29. [4] Semaine's Case, 5 Coke, 91.

to the window, intending to get into it and so reach the debtor. The debtor's daughter, discovering the stratagem, naturally and dutifully tried to shut the window, and a scuffle ensued, during which the debtor himself came to her assistance, and a pane of glass was broken in the storming process. The bailiff then with much ready wit managed to put his hand through the broken window and touched the debtor, saying, "You are my prisoner," and forthwith descended the ladder, broke open the outer door of the house, and seized his debtor and conveyed him to gaol. It was held, in 1858, by three judges, and afterwards by five more on appeal, that the bailiff was quite right, and was justified in what he did, some of the judges saying that it was proved, that it was not the bailiff who had broken the pane of glass; and so it having been accidentally broken, he had a right to avail himself of the opening and to touch the debtor—and a touch constituted in the eye of the law a legal and complete arrest.[1]

Moreover, though a bailiff cannot break open the outer door of a debtor's house in order to arrest the latter for debt, he may by any trick, stratagem, or falsehood try to get inside peaceably; and when once inside he can then break his way into all the inner doors and rooms.[2] Or if the bailiff has once got in and been forcibly turned out, he may again break his way back into the interior.[3] And though the bailiff cannot break open the debtor's own house, yet he may break open the house of a third person to get the debtor if he is therein, the only condition in that case being, that before the bailiff breaks the outer door, he must first state his object and request peaceable entry.[4] Nay, it seems the bailiff may even break into a third person's house to search for a debtor, if he has reasonable ground to believe that the debtor is there; but this is a great risk, for if the debtor is not there, the bailiff is a trespasser.[5] And an outhouse near, but not in the curtilage of the debtor's house, may be broken into to take him, because it is no part of the castle.[6]

One thing thus required of a bailiff in arresting a debtor

[1] Sandon v Jervis, E. B. & E. 935. [2] Lee v Gansel, 1 Cowp. 1. [3] Aga v R., 4 Moore, P. C. 239. [4] Hutchinson v Birch, 4 Taunt. 619. [5] Cooke v Birt, 5 Taunt. 765. [6] Penton v Browne, 1 Sid. 186.

is, that where the bailiff is entitled to break open an outer door, he ought first to ask that the door may be opened, and notify the business he has come upon.[1] And the same rule as to previous notification, or as to the exhibiting of some emblem of his office, applies to arrests made by an officer in the street or open places.[2] Though the bailiff in executing civil process ought not to part with his warrant, yet he is bound to show it and explain it on demand; and this duty implies that he must have it in his possession, so as to be forthcoming.[3] And it is no defence against an arrest, that the hour is unseasonable, for all times are seasonable; and the present time is always the best for the officer in so delicate a mission.[4] The only exception to the time is, that it is not lawful to arrest anyone on civil process during the Sunday.[5] And yet if the debtor escape, he may be retaken even on that day.

It not unfrequently happens, that third parties interfere, when they see an arrest attempted, and take the part of the person sought to be arrested. If any fatal consequence however ensue, third parties have not the same excuse, and consequently do not so easily escape the consequences; for, if they have aided and abetted in an assault on the officer, which proves fatal, they are *primâ facie* guilty of murder, if the process was valid.[7]

Escape of debtor from custody.—If the prisoner for debt escape by the negligence of the sheriff, the latter will be liable to the creditor.[8] But if the sheriff retake the prisoner before the creditor has sued him, this is treated, so far as the creditor is concerned, as if there had been no escape at all.[9] If the prisoner escape voluntarily without the sheriff's negligence, the sheriff cannot retake the prisoner, and would be liable for false imprisonment if he did so.[10] In such a situation the creditor can obtain a new writ or order to arrest.[11] When a prisoner for debt escapes,

[1] East, P. C. 324; Fost. 136. [2] East, P. C. 315, 319; R. *v* Mackalley, 9 Rep. 61 (b); 1 Hale, P. C. 462. [3] East, P. C. 319; Galliard *v* Laxton, 2 B. & S. 363; Codd *v* Cabe, L. R., 1 Exch. Div. 352. [4] R. *v* Mackalley, 9 Rep. 68. [5] 29 Ch. II. c. 7, § 6. [6] Anon. 6 Mod. 231. [7] See *ante*, vol. i. p. 359. [8] W. Jones, 145. [9] Arden *v* Goodacre, 11 C. B. 375. [10] 1 Sid. 330; 1 Show. 330; Barnes, 373; 5 T. R. 25. [11] 8 & 9 Will. III. c. 27, § 7.

and the sheriff is liable, the damages recoverable by the creditor consist of the actual loss of the custody estimated as at the time of the escape, and not as at the time of the debtor having the means of payment, if he afterwards acquire such means.[1] But in estimating this loss the resources of the prisoner arising from friends and station in life may be taken into account as well as his actual means.[2] And it may even be, that no actual damage or delay has thereby occurred at all.[3]

How far bankruptcy includes imprisonment.—Bankruptcy is that condition of a debtor where he owes several debts, and being unable to pay them, the law allows the litigation of the various creditors to be consolidated, and his property divided equitably among all. The details of this process are at present immaterial; except so far as they bear on the imprisonment of the debtor. In the time of Henry VIII. the worst that happened to a bankrupt was imprisonment and a distribution of his estate among the creditors.[4] Many changes afterwards occurred in the details of the bankrupt laws, more particularly in the punishments which arise out of the conduct of the bankrupt. In the time of James I. the ears of a bankrupt, who committed perjury or concealed his effects during his examination, were ordered to be nailed to the pillory.[5] But these bodily punishments are abolished, and at present it is only necessary to allude to imprisonment so far as it is allowed, not for specific offences, but as part of the procedure anterior to the final adjudication and winding up of affairs.

When a person is adjudicated a bankrupt, it is his duty to attend all orders of the court for examination and information, so as to assist his creditors, and to deliver up possession of his property to his trustee; otherwise he may be imprisoned for contempt of court.[6] If, however, he comply with the orders of the court, he is not liable to be imprisoned. The occasions on which a bankrupt will, after the presentation of a petition of bankruptcy against him, be liable to be arrested are: (1) where there is probable reason for believing, that he is about to go abroad, or quit

[1] Arden v Goodacre, 11 C. B. 371. [2] Macrae v Clarke, L. R., 1 C. P. 403. [3] Williams v Mostyn, 4 M. & W. 145. [4] 34 & 35 Hen. VIII. c. 4. [5] 1 Jas. I. c. 15, § 4; 21 Jas. I. c. 19. [6] 32 & 33 Vic. c. 71, §§ 19, 86; Rules, 1870.

his place of residence, to avoid examination, or to delay or embarrass the proceedings in bankruptcy; (2) where he is about to remove his goods or chattels with a view of preventing or delaying the trustee in taking possession, or where he has concealed, or is about to conceal, his goods, or any books useful to the creditors; (3) where, after service of the petition, he removes any goods or chattels in his possession above the value of five pounds without the leave of the trustee; and (4) where he fails to attend any examination ordered by the court.[1] And even before any petition of bankruptcy is presented, if a debtor's summons has been granted against him, and he intends to go abroad to evade service, he may be arrested and detained like other debtors.[2] The result, therefore, of the bankruptcy laws is, that during the period of the bankruptcy proceedings the bankrupt remains free from arrest; and imprisonment need not be resorted to at all from first to last. As regards those offences which bankrupts often commit in reference to their peculiar position, such as concealing goods, fraudulently giving false evidence with respect to them, making false entries in books, and other like misconduct, these are punishable as misdemeanours, and in a few cases as felonies, with imprisonment;[3] but the particulars belong more properly to another division of the law.

Excommunication as a punishment.—While imprisonment has long been tried as a punishment for debtors, and has been all but abandoned, there is also another species of punishment which was something more and something less than imprisonment, namely, where a person, though nominally free, was excluded from the society and companionship of others, or, at least, of most of his fellow men, and thus lived the life of an outcast, an object of aversion and abhorrence. This punishment, called excommunication, was the favourite punishment wielded by the ecclesiastics for many centuries, and was applied to a great variety of offences, though it has wholly disappeared from English civilisation, or exists only to be all but universally disregarded as a means either of punishment or of compulsion. As it, however, has made a great figure in the

[1] 32 & 33 Vic. c. 71, § 86; Rule 177, 1870. [2] 33 & 34 Vic. c. 76, § 1. [3] 32 & 33 Vic. c. 62, §§ 11-14.

world, and is not yet wholly extinguished, it ought here to find some notice before it descends into oblivion.

Early use of excommunication.—The Church did not in early times profess to enforce its censures by other than spiritual means, such as by admonishing the offender, by excluding him from the communion, called the lesser excommunication, and finally by his expulsion from the Church, called the greater excommunication, total separation, anathema, and the like.[1] The great crimes, for which excommunication was inflicted, were variously stated. The laws of Theodosius the Great specify eight, namely, treason, parricide, murder, adultery, ravishment, incest, necromancy, and counterfeiting the imperial coin.[2] In 824 Lothair I. issued the first general command to the courts and ministers of justice to enforce by secular proceedings all sentences of excommunication; and chains and the dungeon followed to the hardened criminal.[3] The Carlovingians enforced the penalties of excommunication by secular power, and two subjects claimed pre-eminent attention: one was the prohibition of marriages between persons of certain degrees of relationship, the other was the spoliation of the Church. In William the Conqueror's time, the king and the sheriff took on them to enforce the punishment of excommunicated persons.[4] And in the time of Edward I. the ecclesiastical courts punished for deadly sins, as fornication, adultery, and such like, for which sometimes corporal penance and sometimes pecuniary fine was enjoined.[5]

Extent of the punishment by excommunication.—Almost every code in Europe recognised the duty of the state to strip an excommunicate of his citizenship, and to declare him an outlaw, a *caput lupinum*, to be hunted and slain by anyone. In England before the Conquest the harbouring of an excommunicate placed an offender at the king's

[1] Bingh. Chr. Antiq. b. xiv. c. 2. The Jewish curse of excommunication—maranatha—confiscated the goods and cut off the guilty from all social intercourse.—1 *Univ. Hist.* 674. One of the punishments in the Roman law for such crimes as poisoning and peculation was the interdiction of fire and water, *aquæ et ignis interdictio*, which prevented anyone harbouring the criminal.

[2] Cod. Theod. lib. ix. tit. 38, leg. 6. [3] Lothar. 1 Capit. tit. ii. cap. 15. [4] 1 Stubbs, Const. H. 283. [5] 2 Inst. 601, 614; 13 Ed. I.; 9 Ed. II.

mercy.[1] And the excommunicate could enter into no legal contracts, had no status in court, was denied his wager of battle; and no one could eat, or drink, or live with him in public or in private.[2] He thus became an outcast and worse than a leper, with whom it was punishable to exchange a word or a greeting, and who was left to perish in misery and starvation. If a citizen even unawares supplied food and shelter to him, the whole town was frequently subjected to an interdict.[3] When the anathema was pronounced with bell, book, and candle, the priest at the head of the citizens proceeded to stone the excommunicate's house. After ten days' obduracy all friends, relations, and servants were forbidden, under the pain of sharing his punishment, to minister to him salt, or food, or drink, or water, or fire. If he took refuge in a town, or church, or monastery, an interdict was launched at it, and, finally, in a few days more, all judges, nobles, and secular authorities were ordered, under pain of excommunication, to seize and imprison his person and confiscate his property.[4] In 1261 the Council of Lambeth complained of the laxity of the courts in issuing the writ *De Excommunicato Capiendo.* And in 1341 the Council of London complained of excommunicates being liberated on bail.[5] Yet Edward II. claimed the power to remove excommunications within a stated time.[6] Usurers in the middle ages, and until the sixteenth century, were denied funeral rites, on the ground that they were deemed excommunicates.[7] And so were debtors, who died under the sentence of excommunication.[8] In Wales also excommunication was followed within a limited time with forfeiture and outlawry.[9] In France the enforcement by the civil courts of excommunication was formally directed in 1228, though St. Louis in 1250 is said to have hesitated over the practice.[10] In Spain the civil power seems to have been later in enforcing excommunication than in other countries.[11] In the German law of the

[1] Anct. Laws (K., Cnut. Sec. tit. 67); (Hen. I. tit. 10, 11, 13). [2] Mirror, c. 2, §§ 3, 5, 27; c. 3, § 23; Bracton, b. v. tr. 5, c. 23; Fleta, b. vi. c. 15, § 2. [3] Ludewig, Reliq. t. xi. p. 613. [4] Ibid.; Lea, Ch. Studies. [5] Harduin. vii. 539, 1666. [6] 9 Edw. II. c. 7; 13 Rich. II. c. 3. [7] Dalham, Concil. Salisb. 91-99, 233, 505. [8] Edict. Theodoric. cap. 75. [9] Anct. Laws of Wales. [10] Isambert, Anc. Lois Fr. i. 233, 358. [11] Lea, Ch. Studies, 392.

middle ages it was early established, that if the excommunicate proved obstinate for a year and a day, he became an outlaw, and was deprived of all civil rights, and stripped of his possessions.[1] When an excommunicate died, he was denied the right of burial, and his body was suspended to a tree and left to rot in the air,[2] though the clergy afterwards found they could make profit by dispensing with this law.[3] Indeed so formidable a weapon was excommunication deemed, and its influence on men was found to be so emphatic and conspicuous, that the same process was extended to the beasts of the field, and bishops gravely excommunicated caterpillars, rats, and snails, after appointing and hearing counsel in their defence.[4] It was also applied to the recovery of ordinary debts so early as the twelfth century, and so continued for three centuries.[5]

It was calculated by the Synod of Bamberg in 1491, that no less than one hundred offences had become punishable with excommunication, and many of them of the most frivolous character; but nearly all of them were pointed out as ministering more or less directly to the personal interests of the Church.[6]

Resort to excommunication since the English Reformation.—When Henry VIII. threw off his spiritual allegiance to the pope, it formed no part of his object to reduce the spiritual power of excommunication, but he accepted the transference as a grateful addition to his royal prerogatives. The Thirty-Nine Articles of the Church assumed that excommunication was in full force.[7] In 1562 the bishops in convocation complained of the negligence of the sheriffs in imprisoning excommunicates, and the consequent contempt of the Church's censures.[8] And they suggested that any one notably neglecting to attend divine service should be held *ipso facto* excommunicate. And the writ *De Excommunicato Capiendo* was declared by a statute of Elizabeth, in 1562, to issue, authorising the imprisonment without bail of any one

[1] Feudor. lib. v. tit. 10; Jur. Prov. Alam. cap. 351. [2] Harduin, t. vi. p. 1, pp. 884; t. vii. 532. [3] Ludewig, Script. Rer. Germ. i. 1183. [4] Agnel, Curios. Judiciaires, 25, 36; Lea's Ch. Studies. [5] Isambert, xii. 601. [6] Concil. Bamberg. Ann. 1491, tit. 61; 5 Hartzheim, 634. [7] Burnet's Collect. ii. 217. [8] Strype's Annals, i. 272, 310.

who remained under excommunication for forty days; and any sheriff neglecting to execute the writ was to be fined again and again till he obeyed.[1] At that time the only offences subject to excommunication were contempts of court, refusing to attend church, incontinency, usury, heresy, simony, refusing to have a child baptized, declining to receive the communion, and being guilty of errors in doctrine.[2]

A bill to restrain the writ of excommunication was introduced in 3 James I., thereby showing the growing grievance, and the judges at that time reviewed the state of things.[3] And the wide sweep of this process grew so conspicuous, that fifteen thousand citizens of London petitioned the Long Parliament, protesting, among other things, against the general abuse of that great ordinance of excommunication, whereby the prelates and their officers daily excommunicated men for doing that which was lawful, or for vain, idle, and trivial matters, as for opening a shop on a holiday, for not paying a fee or the like, using the sacred ordinance of God as a hook or instrument wherewith to empty men's purses, and to advance their own greatness.[4] And the Long Parliament resolved with little difficulty, that the canons and constitutions ecclesiastical agreed upon with the king's licence in 1640 contained matter contrary to the rights of parliament, to the property and liberty of the subject, and matters tending to sedition.[5] And even the Assembly of Westminster, in 1645, asserted the power of the king to be by divine appointment, and not by the laws of the land; and framed a scheme of church government, under which each congregation was to wield a prerogative almost identical with the old power of excommunication.[6] But the legislature, while conferring on the congregational assembly the right to suspend from communion in certain cases, took care to provide an appeal to synods and to parliament itself.[7] In 1811 attention was called to a striking case :—A sentence of penance passed against a woman in a suit of defamation in the Ecclesiastical Courts, and then sentence of excommunication, and thereupon a *capias*, under which she was arrested, and lay two

[1] 5 Eliz. c. 23. [2] Ibid.; 2 Inst. 661. [3] 1 Parl. Hist. 1069; 2 Inst. 601. [4] 9 Parl. Hist. 114-120. [5] 4 Rushw. 112. [6] 2 Neal's Puritans, 194. [7] 6 Rushw. 210.

years in prison. At that date it was said, that all that penance involved was, that the party was called into the vestry and required to express regret.[1] At length in 1813 the writ *de contumace capiendo* was substituted for the older writ *de excommunicato capiendo*, but it was little else than a mode of arresting a person for contempt of the spiritual court.[2] And under that act, though the ecclesiastical courts might continue to pronounce sentences of excommunication as before, yet those who are excommunicated are not to incur any civil penalty or incapacity whatever, except at most an imprisonment for six months.

Imprisonment for crime generally.—Imprisonment becomes, as civilisation advances, the universal punishment of crime; and in nearly all misdemeanours, and a great majority of felonies, it is now an alternative punishment. In the class of felonies, it is usually made an alternative punishment with penal servitude; and in many of the misdemeanours it is the alternative punishment with fines. The legislature in general, when creating or describing a crime, annexes to it a definite punishment; and imprisonment is usually one of the punishments so assigned. It would serve no useful purpose to collect in one view all these crimes and punishments, since each is specified in the place where that legal right or duty is described, for the violation of which the punishment is assigned.

Imprisonment as a punishment for petty offences.—But over and above the classes of felonies and misdemeanours which are indictable, there is a wide variety of petty offences, which are punished by justices of the peace under statutes in a summary way; and the universal punishment of these is fine or imprisonment, and if a fine is imposed and not paid, then imprisonment is usually ordered as a secondary punishment. These offences are so various and important, and cover so wide a field, and touch on so many subjects, that some account of the manner in which imprisonment is brought to bear in administering this department of law, which comes home especially to those in the lower stations in life, will here find its appropriate place.

In all cases where an offence is punishable summarily by justices of the peace, the person, who has committed it,

[1] 21 Parl. Deb. 101. [2] 53 Geo. III. c. 127.

may, in certain events, be imprisoned either in course of the proceeding, or after the proceeding is completed, and when the adjudication is made. The first step is to lay an information or complaint before one of the justices, for though two justices must generally join in hearing the case, one may grant the preliminary summons.[1]

Apprehension of offender in summary proceedings.—Whenever the proceeding is commenced, and there is no reason for supposing that the defendant will not attend at the time appointed, the first step is to serve him with a summons; and this is founded on the statement of the complainant or prosecutor, which is usually in writing, and is called the information or complaint. The summons is served by a constable, and not by the party who prosecutes; the document being left at the defendant's last abode, or delivered personally into his hands.[2] A reasonable time is also allowed for obedience, and varies from one to several days; but of this the justice is the sole judge.[3] If this summons be not obeyed, or if, in the first instance, it be made to appear on oath, that the defendant is not likely to attend, then a warrant to apprehend him forthwith will at once be issued, under the hand and seal of the justice.[4] Both the summons and the warrant must state the defendant's name, and state shortly the matter of the information or complaint, and the time appointed for the hearing of the case.[5] And no mere formal objections to these writs are allowed. But if the defendant was duly served with the summons, and fails to appear, the justices are entitled to hear the case in his absence, and to adjudicate therein in the same way, as if he had appeared.[6] The warrant to apprehend the defendant may be executed anywhere within the county, by any constable acting within it, and in case of fresh pursuit, within seven miles of the boundary. But if the defendant is not within these limits, then he cannot be arrested under such warrant until it has been backed by a justice of that jurisdiction, within which the defendant is ultimately found.[7] When the case has been heard by the justices, they have power to adjourn the hearing to a future day, and there is no limitation as

[1] 11 & 12 Vic. c. 43, § 29. [2] Ibid. § 1. [3] Re Williams, 21 L. J., M. C. 46. [4] 11 & 12 Vic. c. 43, § 2. [5] Ibid. §§ 1, 3. [6] Ibid. § 2. [7] Ibid. § 3.

to the time of the adjournment, as there is in the case of hearing charges for indictable offences. The justices have power on such an adjournment to commit the defendant to prison, or to discharge him on his recognisance, with or without sureties, to attend again at the time appointed.[1]

Power of justices at petty sessions to convict and imprison.—In disposing of informations and complaints in a summary manner, the jurisdiction is exercised sometimes by one justice only, but in the majority of cases by two, or any greater number of justices who choose to attend, for statutes usually specify the number of justices who are to exercise the jurisdiction.[2] And though two or more may be necessary to dispose of the hearing, yet any other justice of the district may do the preliminary acts of issuing summonses as well as the subsequent acts of enforcing payment or punishment.[3] When justices sit in petty sessions, as their court is then called, the place of their sitting is an open and public court, to which the public are entitled to have access, if there is accommodation. And the defendant is entitled to have his case conducted by a solicitor or counsel on his behalf, if he thinks fit. And whether he conducts his case himself or by an advocate, he has an absolute right to cross-examine his opponent's witnesses, and to have as many witnesses examined on his own behalf as he pleases.[4] When the justices, after hearing the case, resolve to dismiss the information or complaint, the defendant is entitled to a certificate for the purpose of using it as a bar to any subsequent proceedings for the same matters; and the justices have power, if they think fit, to order the prosecutor to pay the defendant's costs, and distrain his goods, or, in default of distress, to imprison him unless and until such costs are paid.[5] If, on the other hand, the justices resolve to make a conviction or order against the defendant, a memorandum or minute thereof is given to him, stating shortly what is required, for it is not necessary to draw up the formal conviction until afterwards.[6] And it is absolutely necessary, that the defendant be served with such minute, before he can be imprisoned, or his goods can be distrained.[7]

[1] 11 & 12 Vic. c. 43, §§ 9, 16. [2] Ibid. § 12. [3] Ibid. § 29.
[4] Ibid. § 12. [5] Ibid. §§ 14, 26. [6] Ibid. § 14. [7] Ibid. § 17.

And when a conviction or order is made, the justices have power to add the costs of the prosecutor.[1]

When the conviction awards a penalty, or any order for money is made, then, if no mode of recovery be specified, or if distress be so specified, the justice may direct the money and costs, if any, to be paid forthwith, or before a certain day, and if not then paid, that the same be levied by distraining the goods of the defendant. Such goods may be distrained if within the county, or, if the warrant be indorsed, then in any other county. But if the defendant has not sufficient goods to be distrained, or if the distress would be ruinous to his family, then, in lieu of distress, the justice may commit the defendant to prison.[2] If, however, a warrant of distress is issued, the defendant may, by verbal order, be kept in safe custody (unless the defendant can give security to appear again) till the result of the distress is known.[3] If there are no goods to distrain, or if the distress has been insufficient, then the justice issues his warrant of commitment, under which the defendant may be imprisoned, and in some cases also kept to hard labour, when the statute so authorises. This imprisonment is, however, merely ancillary to the recovery of the money, and at any time on payment of such sum the defendant may be discharged.[4] As some statutes do not expressly specify that when the penalty or sum ordered shall not be paid the defendant's goods may be distrained, but direct only that if not paid the defendant may be imprisoned, in such cases no warrant of distress need be issued at all, but a warrant of commitment may be issued at once.[5]

In other cases a statute may direct, that, instead of a penalty being awarded as a punishment, or any order to pay money being made, imprisonment alone shall be the punishment on conviction, or on disobedience of the order to do some specific act. In such cases a warrant of distress is incompetent, and a warrant of imprisonment is the only mode of punishment. But even then, if the costs be ordered to be paid, these may be separately recovered by distress, or in default of distress, then by imprisonment for one month, which month is to be added to the term of imprisonment ordered as the principal punishment. On

[1] 11 & 12 Vic. c. 43, § 18. [2] Ibid. § 20. [3] Ibid. [4] Ibid., § 22. [5] Ibid., § 24.

payment of the costs during the month, then the defendant may be immediately discharged.[1]

Length of imprisonment by justices on default of distress of goods.—It is a general rule, that in all cases where the imprisonment is not the substantive punishment, but merely used as a means of compelling payment of a penalty or sum of money, then on payment of the money at any time during the imprisonment the party is entitled to be discharged; and for that purpose, so as to admit of no delay, the keeper of the prison is authorised to accept payment on behalf of the person who is entitled to receive it.[2] The imprisonment of a party for nonpayment of a penalty or sum of money ordered by justices to be paid, is thus one of the means of circuitously compelling payment; and as statutes give considerable latitude to justices as to the term of imprisonment which they may impose, there was needed some fixed rule as to this maximum term in all such cases. Accordingly the legislature in 1865, by the Small Penalties Act, laid down certain rules, whereby the maximum period of such imprisonment is made to vary according to the penalty or sum ordered to be paid; and this maximum period is not allowed to be exceeded, whatever previous acts of parliament may have authorised. Thus for nonpayment of a sum, including costs, not exceeding ten shillings, no longer imprisonment than seven days is lawful; if not exceeding one pound, fourteen days; if not exceeding two pounds, one month; and if not exceeding five pounds, two months.[3]

Though the length of the imprisonment possible as a remedy for nonpayment of a penalty or sum is thus defined in respect of sums of and under five pounds, there is no fixed limit in respect of higher sums. In many statutes a *maximum* imprisonment is defined, whether as the primary punishment, or as a punishment for nonpayment of money, or for failure to do a particular act. Such imprisonment obviously ought not to continue for ever. In those cases where no mode of enforcing payment of penalties or sums of money is specified, or no mode other than distress is

[1] 11 & 12 Vic. c. 43, §§ 24, 31. [2] Ibid. § 28.

[3] 28 & 29 Vic. c. 127. The penalties for breach of Inland Revenue Acts are excepted from this act.—Ib. § 7. The statute is obscure as to its effect in extending the time of imprisonment in some cases.

specified, but where distress is insufficient, then the justices may commit the defendant to gaol for a period not exceeding three months, whatever may be the amount of the penalty or sum to be paid.[1]

Imprisonment for breach of contract.—Though the breach of a contract is merely a cause of action according to the common law, and though in the course of pursuing that remedy, imprisonment was often the ultimate and best available remedy, yet the mere breach did not in the first instance authorise imprisonment as the appropriate punishment. Nevertheless, for centuries it had been the practice to single out from all other contracts the contracts of labourers in trade and husbandry, and make the mere breach on their part a cause for immediate imprisonment, and in some cases as an alternative for nonpayment of a fine imposed in a summary way. But this one-sided and oppressive legislation was wholly put an end to in 1875, and these contracts are treated in the same way as other contracts, so far as regards the nature of the punishment or final redress.[2] The remedy for breach of such contract is administered impartially between the employed and the employer; and damages payable by either side are the appropriate remedy.[3] Nevertheless, a few special contracts are still excepted from the general rule, and the breach of them subjected to the punishment of imprisonment, on account of the peculiar urgency of the business, and the immediate and widespread injury and suffering which may follow to third parties. Thus where a person, and he is usually a workman or servant, is employed by a municipal authority or by some company or contractor, upon whom is imposed by statute the duty to supply a city or district with gas or water, wilfully breaks his contract, he is liable either to a fine of twenty pounds, or to immediate imprisonment for three months.[4] Moreover, where a person wilfully and maliciously breaks a contract of service or of hiring, knowing or having reasonable cause to believe, that the consequence will be to endanger human life and cause serious bodily injury, or to expose valuable property to destruction or serious injury, in that case also

[1] 11 & 12 Vic. c. 43, § 22. [2] 38 & 39 Vic. c. 86. [3] Ibid. c. 90.
[4] Ibid. c. 86, § 4.

he is subject to fine or immediate imprisonment for three months.[1]

Imprisonment was not only common in ancient times for breach of contract, but it was also competent for refusing to work at all. To conspire not to work except at fixed wages was an offence punished by imprisonment, and a second offence was punished by the pillory, and a third by the loss of an ear;[2] while artificers, shoemakers, and such like, who refused to continue in their service were also imprisoned.[3] But in modern times a more just and impartial view has been taken of these subjects.

Imprisonment for crown and revenue debts and offences.—Most of the revenue offences are in the same class as those which are punishable in a summary way by justices of the peace; and at times great jealousy has been excited as to any arbitrary mode of enforcing this part of the law. It seems always to have been the rule that an offence, whereby one evades or refuses payment of a debt to the revenue, or withholds payment to the crown, should differ from other offences in the mode of recovering the money and the severity of the punishment.[4] In most of the minor offences against the revenue no substantial difference is noticeable; but, as has been already stated, debts due to the crown are still enforceable by imprisonment, though that mode of enforcing ordinary debts has been practically abolished.[5] Not only is imprisonment for a crown debt not abolished by the act which abolished other imprisonments for debt, but the Bankruptcy Act still excepts also the same debts from the ordinary rule; and hence a bankrupt, though discharged from all other debts, cannot obtain any discharge from the debts which he owes to the crown unless the treasury give consent.[6]

Imprisonment for contempt of parliament.—While debt and crime have always been the main grounds for imprisonment, and though debt now seldom gives rise to it, owing

[1] 38 & 39 Vic. c. 86, § 5. [2] 2 & 3 Ed. VI. c. 15, § 1. [3] 3 & 4 Ed. VI. c. 22. See *ante*, vol. i. p. 218.

[4] Constantine made a law, forbidding officers of the revenue from punishing with rods or confining in public prisons defaulting taxpayers, but ordered them to be secured in places where every one might see and visit them.—*Cod. Theod.*

[5] 32 & 33 Vic. c. 62, § 4. [6] Ibid. c. 71, § 49.

to a change in the views of the legislature as to that mode of punishment, there are still two grounds of imprisonment which come under neither the one description nor the other. These are commitments for contempt of parliament and for contempts of courts of law. The most transcendent of all courts known to municipal law is the parliament, because its main object is to correct and improve the law, not indeed, except in very rare cases, by interfering with any matter of which the courts are already seised, and which is in train for final decision, but by conceiving and maturing new processes and new rights so as to supersede altogether the obsolete or oppressive methods and procedure of those courts, which are too apt at all times to degenerate into something widely different from the purpose of their first institution. All that is great and dignified in human affairs—all that is invincible in power—all that flows from many-sided sympathies and means of knowledge and a desire to redress injustice—are combined in the exercise of this high privilege. Parliament is the most powerful and most venerable of all the institutions created by and known to mankind. Its objects are inseparably identified with the best interests of the community, and, indeed, most of the members of this high court are themselves the people, being chosen by and out of the people, and selected to give their best thoughts, their constant care and vigilance to the promotion of none other than public interests, and, above all, to prevent any one class or interest from oppressing another. There are two great divisions of the subject pertaining to the rights, powers, and privileges belonging to this high court. The powers and practice of the court itself, and its relation to its own members, belong to that division of the law entitled "The Legislature;" but there are some aspects also in which those powers and privileges come into collision with rights of individuals outside the walls of parliament, and lead to the arrest and imprisonment of offenders who are said in that respect to commit a breach of privilege or a contempt of the power and authority of this commanding tribunal.

This breach of privilege is founded on the fundamental principle, that, as parliament exists for the general good, it behoves each and every citizen at all times to treat it

with more than ordinary respect; and in doing so each only reflects the greatness which belongs to his country. Each is bound to give credit to all legislators, individually and collectively, that they are actuated by motives akin to the great purposes which the legislature keeps in view. All are bound to abstain from molesting and obstructing each member in the discharge of his parliamentary functions, and to avoid even the appearance of slighting or weakening his authority by any speech or writing tending to mere scurrility and abuse. As will be seen hereafter, all this is quite compatible with that ample freedom of discussion, argument, and ridicule, which is the life of great communities. Without such freedom of thought, indeed, nations necessarily stagnate, and develop nothing but slavery, superstition, and weakness; while with it intelligence, enterprise, and self-reform make perpetual progress. It is thus apparent, that much of the occasion for any collision between parliament and individuals outside turns on that freedom of thought and speech, which is part of the law of the land. An account of the extent and limits of this freedom belongs, however, to another division of the law, and cannot in this place be adequately treated. It will suffice, at present, only to point out some of the leading outlines of the punishment that may be inflicted on any one of the public, who commits a breach of privilege, leaving the full meaning of so comprehensive a phrase and the various subjects it affects, to be more fully explained in another place. The punishment for contempt, in a swift and summary way, is believed by all to be essential to the dignity of this greatest of human tribunals; for, as was said by Lord Ellenborough, it could not be tolerated that the Speaker of the House of Commons, with his mace, should go and wait upon a grand jury, in order to prefer an indictment for every insult upon the House of which he is the organ.[1]

Usual grounds of commitment by parliament. — The most frequent causes of committal for contempt of parliament are wilful disobedience of orders to attend as witnesses, insults and obstructions to members, assaults and libels, or wilful misrepresentations of proceedings in the house, interference with the officers of the house in

[1] Burdett v Abbott, 14 East, 1.

discharge of their duty, and the offering of bribes to members. It was once, indeed, deemed a cause of contempt for any person to publish a report of a debate in parliament, whether correct or not; and standing orders of the houses to that effect, dated, some of them, even so late as 1722, are still in force. But though not expunged, such orders are wisely treated as obsolete, being made at a time when the limits of freedom of thought and speech were not understood in any part of the world, and when parliaments were little wiser than the wisest men of their age in that matter.[1] The orders are now kept alive, therefore, merely to prevent a person, who wilfully misrepresents what has been said in parliament, or foolishly publishes a matter not yet finally decided, having any excuse for complaining of so summary a mode of punishment overtaking him.[2] But while parliament itself may be content, as it usually is, freely to allow a publication of its proceedings, this state of things is produced between the public outside of parliament, that any one of that public may lawfully publish such proceedings, if these are correctly reported; even though the character of a third party may be thereby injured.[3] The bearing and effect, however, of this law, as well as kindred laws, can only be fully appreciated, when the freedom of thought and speech comes to be treated of.

Both houses of parliament have for centuries admitted, and in 1704 expressly declared, that neither of them can create any new privilege, but is bound to abide by those already known or supposed to be known and settled as part of the *lex et consuetudo parliamenti*.[4] But in dealing with any new circumstances which are alleged to involve a breach of such privileges as exist, they reserve in their own hands the adjudication, and do not trust any court of law to interfere with their own judgment in the matter, or expound for them what they themselves are assumed already to know.

[1] May's Parlt. 87.

[2] A stranger, who left his umbrella at the bar of the House of Lords, and sued the doorkeeper for its loss, was summoned to the bar for breach of privilege. The matter, however, dropped.—17 *Parl Deb.* (2nd) 35.

[3] Wason *v* Walter, 8 B. & S. 671. [4] 14 Com. J. 555, 560.

Mode in which parliament orders arrest.—Either house of parliament, when advised of any breach of privilege, first orders the party to attend the house, and will not direct his arrest, unless upon oath first made at the bar, or on a report of a committee of privileges.[1] And to prevent frivolous complaints, both houses have a wise standing order, that the member who makes it must pay the costs of any person groundlessly summoned to attend at the bar for such a cause.[2] In executing a warrant of either house to arrest an offender, the assistance of the sheriff and all justices of the peace, and also of the *posse comitatus*, if needed, is often ordered at the same time.[3] And in executing the warrant, the officer may break the outer door of the offender's house, as was decided in the case of Sir F. Burdett, when the Court of Queen's Bench held that this power was necessarily incident to the enforcement of any order of a high court to commit for contempt.[4] But though the officer may break open the outer door to get in, he has no right to remain in the house waiting for the offender to return.[5]

Mode in which parliament commits for contempt.—The House of Lords commits an offender against its privileges by attachment for a fixed time, and orders security to be given for good conduct; but the Commons do not usually specify in their commitment any period for the imprisonment.[6] And the time, for which the Lords may commit, may extend beyond the prorogation, though in the case of a commitment, with no period mentioned, the imprisonment ceases with the sitting of parliament. And though, about the period of 1621, the houses, like courts of law, ordered an offender to be pilloried and burnt in the cheek, these punishments are altogether unlawful; and imprisonment alone is now ordered as a bodily punishment, the commitment by the Commons being made to the custody of the sergeant-at-arms, or Newgate, or the Tower.

When a person is committed by the House of Lords for contempt, and sues out a *habeas corpus*, the courts are

1 Lords St. Ord. No. 81, 82; 11 Com. J. 219; 13 Com. J. 648; May's Parl. 100.
2 Lords St. Ord. No. 81; 31 Com. J. 602.
3 2 Com. J. 29; 8 Ib. 222; 14 Lords J. 530; May's Parl. 73.
4 Burdett v Abbott, 14 East, 157; 4 Taunt. 401; 5 Dow, 165.
5 Howard v Gossett, 1 C. & M. 382.
6 May's Parl. 103.

satisfied that it is right, whenever it appears that the commitment is expressed to be for a breach of the privilege of parliament, without giving any further particulars. And while the sergeant-at-arms, or others who have in custody the prisoner, at one time thought it unnecessary to make any answer, they now make their return, like other gaolers, to the writ of *habeas corpus;* and the courts thereupon remand the prisoner as a matter of course to the same custody, whenever they see the reason of the imprisonment thus stated.[1] And not only is the commitment sufficient, if it state nothing but a breach of the privilege of parliament, but the prisoner cannot, in that stage, be bailed by any court of law.[2] The reason of this is, that as the commitment is in the nature of a commitment in execution, no court can discharge the prisoner from it;[3] and another reason is, that it is a commitment for contempt, and no high court can interfere with the commitment of another high court in any such case.[4] It is true, that, if the commitment state, not that the cause of commitment is a breach of privilege, but something else, then it has been suggested, that the courts may very well exercise their judgment as to whether this something else is a known offence.[5]

Sometimes a prisoner is ordered to be reprimanded at the bar before his discharge. And at one time it was deemed an essential preliminary to a discharge, while the prisoner was receiving the judgment of the house, that he should kneel at the bar. But in 1772 the House of Commons was somewhat surprised to find, that it could not, with all its power and authority, make a prisoner bend his knee, if he was not so inclined.[6] And hence, in that year, it resolved not to try to enforce what was impossible, and made a resolution that in future a prisoner should receive his judgment standing at the bar. And the House of Lords, for a like reason, also dispenses with any kneeling on the part of the prisoner on such an occasion.[7]

Imprisonment for contempt of court.—For reasons similar

[1] 14 Com. J. 565; 95 Com. J. 25; May's Parl. Hist. 79. [2] 5 Com. J. 221; 5 St. Tr. 365, 948; 9 Com. J. 356; R. *v* Patey, 6 St. Tr. 1269; 1 Wils. 200. [3] Crosby's Case, 19 St. Tr. 1137. [4] R. *v* Hobhouse, 3 B. & Ald. 420; Re Sheriff of Middlesex, 11 A. & E. 273. [5] Burdett *v* Abbott, 14 East, 1; Gossett *v* Howard, May's Parl. 84. [6] Murray's Case, 14 Parl. Hist. 894. [7] See *ante*, vol. i. p. 37.

to those that actuate the High Court of Parliament, courts of justice have a like practice of committing certain offenders for contempt of court. It is one of the rules of law, that every court of record has an inherent right to punish for contempt; and difficulties have arisen as to what is a court of record, and what is a contempt.[1] It is unnecessary here to digress into the first of these inquiries, except to notice that there are superior and inferior courts of record. And where an inferior court of record commits for contempt, a superior court will not interfere with its action, except only to see that the inferior court has not travelled beyond its jurisdiction, for such inferior court must be credited with the knowledge of its own business to a certain extent.[2]

What is the extreme limit to which a court of law can go in exercising this summary jurisdiction—for what offences or grounds of complaint—in what part of the country, and whether in or out of court that offence may be committed—whether the cause of offence must be confined to something which actually obstructs the business of the court or directly imputes corruption, and so, as Wilmot, J., said, to murder the fame of a judge, which is the vital part of the judicial authority—all these are inquiries which more strictly belong to another division of the law intituled the "Security of free thought and speech." It is enough here to assume, that, though a man may commit no known crime and owe no debt, yet he may by some act, or speech, or writing, become amenable to the swift condemnation of a court of record, and be imprisoned for that cause without bail or any mode of escape.

This practice of courts of record was traced by Wilmot, J., and he concluded that the Statute of Westminster, c. 2, did not give rise to it, as was often suggested, but merely confirmed and recognised it as already existing; and that this swift and summary mode of vindicating the dignity and authority of a court of justice is as much part of the *lex terræ*, and within the exception of Magna Charta, as the issuing of any legal process whatsoever. And though that learned judge did not venture to say, that it was as

[1] Kemp v Neville, 10 C. B., N. S. 523. [2] Re Carus Wilson, 7 Q. B. 984; Ex p. Pater, 5 B. & S. 299.

important a chapter of the law as Trial by Jury, yet he said it rested on the very same foundation and basis, namely, immemorial usage and practice.[1] And yet there are some features of this process of courts of law, which have in modern times staggered spectators. By this proceeding, Erskine said, the party offended is the judge, creates the offence without any previous promulgation, avoids the tedious and doubtful ceremony of proof, by forcing the defendant to accuse himself, and inflicts an arbitrary punishment, which, if not submitted to and reverenced by the nation as law, is to be the parent of new contempts, to be punished like the former.[2] And the same advocate, who was one of the greatest champions of the liberty of the press that ever appeared, wrote on another occasion as follows on the same subject:—"I venture to lay down this distinct and absolute limitation to the process of commitment for contempt, viz., that it can only issue in cases, where the court, which issues it, has awarded some process—given some judgment, made some legal order, or done some act, which the party, against whom it issues, or others, on whom it is binding, have either neglected to obey, contumaciously refused to submit to, excited others to defeat by artifice or force, or treated with terms of contumely and disrespect. But no crime, however enormous, even open treason and rebellion, which carries with them a contempt of all law and of the authority of all courts, can possibly be considered as a contempt of any particular court, so as to be punishable by attachment, unless the act, which is the object of that punishment, be in direct violation or obstruction of something previously done by the court which issues it, and which the party attached was bound by some antecedent proceeding of it to make the rule of his conduct. A constructive extension of contempt beyond the limits of this plain principle would evidently involve every misdemeanour, and deprive the subject of the trial by jury in all cases, where the punishment does not extend to touch his life."[3]

The usual causes for an attachment for contempt are an obstruction or contemptuous treatment of officers of the court and the process served—rescue of prisoners—insulting conduct in court—libels on judges or courts, or

[1] Wilmot, Op. 254. [2] 8 St. Tr. 87. [3] Ibid. 86.

officious publications prematurely made relating to pending trials—or imputations of corruption—intimidation, or obstruction of witnesses—non-payment of money ordered by the court to be paid. Sometimes inferior courts, which have this power of committal conferred by statute or otherwise, imitate too closely the power of the Supreme Court, and err in extending it to cases which, when examined, do not fall properly within it. And it may be said that inferior courts have at most a power to commit for contempt, only when the contempt is in the face of the court itself.[1]

Before commitment for contempt offender first heard.—In no case, except where there has been non-payment of money ordered, disobedience by a sheriff, or a contempt of process, will the court order a party to be attached or imprisoned for contempt, without first giving him an opportunity of being heard, and a personal service of the rule calling upon him for explanation.[2] And it is only after hearing what he has to say or after his non-appearance that an attachment is issued to arrest him; and he must then be brought before the court itself. He is then more formally examined either on affidavit or on interrogatories, or examined before an officer of court, who reports on the matter. The prisoner cannot be arrested on a Sunday; nor can he be served on that day with the rule *nisi* preliminary to an arrest.[3]

Mode of punishing for contempt of court.—The court may, it seems, commit for contempt without any written warrant, for in contemplation of law the record exists, though not yet drawn up.[4] And the words of a warrant of commitment may be general, expressing nothing more than that the party was adjudged guilty of contempt of court.[5] No other court can interfere with the commitment for contempt so expressed.[6] It is discretionary in the court to fine or imprison the offender. The Chancery Division commits during pleasure,[7] it being presumed, that

[1] R. *v* Lefroy, L. R., 8 Q. B. 134. [2] Re Pollard, L. R., 2 P. C. 106. [3] Macilcham *v* Smith, 8 T. R. 86. [4] Wilson's Case, 7 Q. B. 1016; Watson *v* Bodell, 14 M. & W. 70. [5] Re Fernandez, 6 H. & N. 717; Re Cobbett, 7 Q. B. 187; Kemp *v* Neville, 10 C. B., N. S. 523. [6] Re Crawford, 13 Q. B. 613. [7] Re Charlton, 2 Myl. & Cr. 316.

when the prisoner clears his contempt he will be discharged. And to commit until further order seems always a competent course.[1] The prisoner will be released from any fine or costs, if that is the cause of his imprisonment, should he be discharged under the Bankruptcy Act.[2] But when the imprisonment is in execution, he must remain where he is, till the court thinks fit to discharge him. And there seems to be no limit imposed by the law either to the amount of fine or imprisonment which the court may impose, it being presumed that the punishment will be wisely adapted to all the varying circumstances of each particular case.

Contempts of the Court of Chancery.—In the early part of the present century the number, extent, and severity of the punishments for contempt of the Court of Chancery gave great trouble to the legislature, and provoked constant comments. Unlike the courts of law, which imprison for contempt only for a fixed period, the Court of Chancery committed for an indefinite period. In 1817 it was made obvious to the House of Commons, that prisoners for contempt of that court, in not paying costs, sometimes lay thirty years in gaol.[3] But though punishing those who committed contempt by disrespectful conduct, it usually released them after a reasonable time.[4] Nevertheless, when the contempt consisted in not obeying the decrees of the court, either by not doing some act or paying some costs ordered, and that, either wilfully or because obedience was impossible, the imprisonment, being indefinite, might, and often did, continue for life, so that death alone could operate as a relief. The extent to which imprisonment for contempt during a suit can be carried was afterwards regulated by a statute of 1830.[5] Those who were imprisoned for costs were allowed in 1809 to obtain their discharge like other debtors,[6] and this law is continued to the present time under the modern Bankruptcy Acts.

Gaols for keeping offenders.—The law would be powerless, if it had not prisons in which to confine offenders—

[1] Green v Elgie, 5 Q. B. 99. [2] 32 & 33 Vic. c. 71, § 49. [3] 36 Parl. Deb. 159. [4] 8 Hans. Deb. (2nd) 808. [5] 1 Will. IV. c. 36, § 15. [6] 49 Geo. III. c. 6; 53 Geo. III. c. 102, § 47; 14 Hans. Deb. (2nd) 1178.

to keep them safe till the trial, and to keep them safe after sentence should be delivered. For purposes of arrest and for purposes of punishment gaols are indispensable. For centuries there was a great want of method in providing these convenient and indispensable receptacles. The bishops in the middle ages had their own prisons for lay offenders, and the monasteries were the appropriate prisons of clerks.[1] Each feudal lord had his dungeon as incident to the ample jurisdiction which he exercised over the life and limbs of each of his vassals. By a statute of Henry VII. sheriffs were to have the keeping of gaols except private gaols in inheritance, and were liable to be fined for the negligent escape of criminals, whether on being taken to prison or after being confined.[2] And a petition of grievances at an early period dwelt on the practice of granting gaols to others than sheriffs.[3] A statute of Henry VIII., however, authorised the justices of a county to have a common gaol, and to tax every person resident in the county and having lands above a certain value towards a reasonable aid, and to distrain their goods in default of payment; but towns having gaols already were exempted. And in these common gaols and not elsewhere all murderers and felons were to be imprisoned.[4] The justices were authorised to assess parishes for the relief of the prisoners when so confined.[5] And the sheriff was to have the keeping of the gaols.[6] In 1701, a committee of the Society for Promoting Christian Knowledge examined into the abuses of gaols, and found these to consist in lewdness, prostitution, use of intoxicating liquors, swearing, and the inevitable corrupting of the new inmates by the old inmates.[7] In 1729, when the abuses of English prisons cried loudly for remedy, and the House of Commons made inquiry, it was found, that one Bainbridge had bought the Fleet Prison as private property, and there he kept prisoners like cattle, cooped them in infected rooms, and in dungeons open to the common sewers, having no inlet of light, except a hole of eight inches square, and without chimney or fireplace. These wretches were loaded with irons and manacles at the discretion of their tyrant gaoler, whose

[1] 2 Hallam, Mid. Ag. 221. [2] 19 Hen. VII. c. 10. [3] 1 Parl. Hist. 1493. [4] 23 Hen. VIII. c. 2. [5] 14 Eliz. c. 5, § 38. [6] 11 Will. III. c. 19. [7] Dixon's Howard, 10.

extortions were infamous. And it was then that Oglethorpe, driven, as Pope said, "by strong benevolence of soul," laid bare these crimes, and the House ordered gaoler and assistants to be prosecuted and imprisoned.[1] The noble efforts of Howard, a quarter of a century later, opened the way to an improved system of management.

It is now a rule declared by parliament, that sufficient prison accommodation must be provided at the expense of every county, borough, and like place in England; and the expenses fall on the county, borough, or similar rate.[2] And the prison authorities bound to see to this requirement are the justices, and the town council for boroughs, and for the city of London the lord mayor and aldermen.[3] The secretary of state must approve of plans for altering and building prisons.[4] And the Public Works Commissioners may lend the money required on security of rates.[5] The justices of the county, division, borough, or district have power to make rules as to the dietary of the prisoners, subject to the approval of the secretary of state.[6] And there has long been much need of uniformity in the treatment and interior economy of all public gaols.[7]

Appointment of the gaoler and officers.—In every prison the justices must appoint a gaoler, a chaplain, being a clergyman of the Established Church, a duly registered surgeon, and in prisons where females are detained a matron.[8] With regard to the chaplain, the justices may, whenever a sufficient number of prisoners belong to a certain church, or persuasion, appoint a minister of that persuasion to attend, and may pay him a sum out of the expenses of the prison.[9] And over and above these provisions the visiting justices may always allow a minister of the persuasion of the prisoner to visit the latter at reasonable times, and under precautions such as will prevent improper communications.[10] And it is the duty of the keeper of the

[1] 8 Parl. Hist. 706. [2] 28 & 29 Vic. c. 126, § 8. [3] Ibid. § 5. [4] Ibid. § 24. [5] Ibid. § 29. [6] Ibid. § 21.

[7] In 1874 there were 116 gaols in England and Wales.—2 *Pike on Crime*, 485. And there were 28,000 persons in custody, namely, prisoners before and after trial, and debtors.—2 *Pike on Crime*, 487.

[8] 28 & 29 Vic. c. 126, § 10. [9] 26 & 27 Vic. c. 79, § 3. [10] Ibid.

prison to keep a register of the religious persuasion to which each prisoner declares himself to belong.[1]

Inspection of prisons by central authority.—But local management of prisons is not enough. The inspector of prisons may address a letter to the visiting justices calling attention to complaints and irregularities.[2] A coroner must hold an inquest on the body of every prisoner who dies within the prison.[3] Visiting justices are appointed, whose duty it is to visit and inspect the prison from time to time, and examine minutely all the details and all abuses.[4] Moreover, any justice of the peace, having jurisdiction in the place, may, whenever he thinks fit, enter and examine the condition of the prison and prisoners, and record his observations in the visitors' book.[5] It is the duty of the gaoler to keep the prisoners safely; and they are all deemed to be in his legal custody, except that prisoners under sentence of death are under charge of the sheriff.[6] The gaoler has no power whatever to remove a prisoner to another prison, though a secretary of state may do so.[7]

Separate cell for each prisoner.—In the interior management of prisons a separate cell is provided for each prisoner, and other cells as punishment cells, when prisoners have committed prison offences. The women are confined in a separate part of the prison, so as to prevent their seeing, conversing with, or holding any intercourse with the male prisoners. The imprisoned debtors are kept separate from criminal prisoners. And each criminal prisoner is either kept in a separate cell by day and by night, except when he is at chapel or taking exercise, or is so superintended during the day, as to prevent his communication with any other prisoner.[8] Each cell must be certified by the inspector of prisons to be fit for the long or short period of imprisonment intended; and each punishment cell must have a means of constant communication with an officer of the prison.[9]

Prisoner to be photographed.—Of late years a plan has been adopted for tracing more easily the past and future history of prisoners. It is part of the duties incumbent on a prisoner to submit to be photographed, otherwise he is guilty of

[1] 26 & 27 Vic. c. 79, § 4. [2] 28 & 29 Vic. c. 126, § 22. [3] Ibid. § 48. [4] Ibid. § 53. [5] Ibid. c. 126. [6] Ibid. § 58. [7] Ibid. § 65. [8] Ibid. § 17. [9] Ibid. § 18.

an offence against the prison discipline; and the expenses form part of the prison maintenance in most instances.[1] The secretary of state, however, may from time to time direct what classes of prisoners are to be subjected to the photographer.[2]

Offences against discipline of prison.—The safety and good management of prisons are secured by imposing punishment on those who interfere with them. Whoever from without does anything in the nature of facilitating an escape, or of inciting those within to insubordination, is punished severely.[3] Whoever, contrary to the regulations, introduces spirituous liquor or tobacco into a prison is liable to imprisonment for six months.[4] And whoever conveys a letter, contrary to the regulations, into or out of a prison incurs a penalty of ten pounds.[5] For greater publicity a notice of these offences is always affixed in a conspicuous place outside the prison.[6] And in all prisons it is necessary to appoint punishments and privations in aid of the discipline. There are some grave prison offences which peculiarly call for further checks: such are disobedience of the prison regulations, assaults, profane cursing, indecent behaviour, irreverent behaviour at chapel, insulting or threatening language, absence from chapel without leave, idleness or negligence at work, wilful mismanagement of work. For such offences as these the gaoler may examine, and punish the offender by confinement for three days, and direct him to be kept upon bread and water. All punishments must however be recorded in a book, and in case of repeated offences, or other offences than the above, one of the visiting justices may order the offender to be confined in a punishment cell for a month, or in some cases to be personally corrected. But no prisoner can be put in irons, or under mechanical restraint except in case of urgent necessity, and in no case for more than twenty-four hours without a written order of a visiting justice. And all corporal punishments within the prison must be attended by the gaoler and surgeon.[7]

Aid to discharged prisoners.—In modern times benevolence comes to the aid of prisoners when they have

[1] 34 & 35 Vic. c. 112, § 6. [2] 39 & 40 Vic. c. 23. [3] 28 & 29 Vic. c. 126, § 37. [4] Ibid. § 38. [5] Ibid. § 39. [6] Ibid. § 40. [7] Ibid. sched.

completed their sentence. Whenever the sentence of a prisoner expires on a Sunday, he is allowed to be discharged on the previous Saturday.[1] Indeed, if a gaoler detain a prisoner a day after he is entitled to a discharge, this is deemed a false imprisonment.[2] When he is discharged, the justices may allow him, out of moneys under their control a sum of two pounds, or may pay that sum to a benevolent society instituted to aid discharged prisoners, if satisfied it will be applied to his benefit.[3] And the justices may pay the travelling expenses of the prisoner to his home or place of settlement.[4]

Escape from prison.—As might be supposed, a serious offence is committed either in escaping or aiding an escape from a prison. It seems to have been treated at first as a capital offence to escape; but in 1295, it was declared to be no longer so, unless the imprisonment itself was for a capital crime.[5] The gaolers of the Fleet used of their own authority to let prisoners out, and sometimes on bail; but this lax practice was prohibited without the consent of the creditor, else the gaoler was liable for the debt.[6] And the king's protection could not be pleaded by gaolers as a defence for letting prisoners escape.[7] If a criminal prisoner once lawfully imprisoned walk out of a prison, whether the doors are left open by negligence or the act of others, he still commits a misdemeanour.[8] Whoever aids a prisoner to escape, or conveys into prison a mask or device or disguise, or letter to facilitate it, is guilty of felony, and suffers two years' imprisonment.[9] And if a private person has taken on himself the custody of a prisoner lawfully arrested, and then allows an escape, he is indictable for misdemeanour.[10]

Duties of officers in gaols as to cleanliness.—The interior of a prison must now be systematically kept clean. And much vigilance is required in the selection and control of the officers in that particular. No officer of the prison is allowed to sell or let any article to a prisoner, or to have any interest in the supplies to the prisoner, or to receive

[1] 28 & 29 Vic. c. 126, § 41. [2] 2 Inst. 53. [3] 28 & 29 Vic. c. 126, § 42; 25 & 26 Vic. c. 44. [4] 28 & 29 Vic. c. 126, § 43. [5] 23 Ed. I. Stat. Pris. [6] 1 Rich. II. c. 12. [7] 7 Hen. IV. c. 4. [8] 1 Hale, 611. [9] 28 & 29 Vic. c. 126, § 37. [10] 1 Hale, 595; 2 Hawk. P. C. c. 20.

money or gratuity for admitting visitors. The gaoler must reside in the prison, and has absolute power to suspend any subordinate officer for misconduct. His duty is to visit the whole of the prison and see every male prisoner once in twenty-four hours, or explain the omission in his journal. Once a week he must go through the prison at an uncertain hour of the night, and record this in the journal. He must keep a book in which to record all the leading incidents in the prison. The matron has corresponding duties as to the female prisoners. The surgeon must see every prisoner at least once a week, and each of the prisoners in the punishment cells daily. Subordinate officers are not to be absent nor to receive visitors within the prison without leave of the gaoler. And the gate porter may stop persons suspected of bringing in spirits, or carrying out property belonging to the prison.[1]

Prisoners and general treatment in prison.—Until the time of Howard the world cared little what went on in prisons, and left the prisoner very much to the mercy of the gaoler. Constantine, it is true, ordered prisoners to be treated with humanity, though guilty, and to be kept in wholesome places, and extortioners were punished with death.[2] In the earliest times of English law very sound theoretical principles existed. At common law a right to redress was acknowledged, when a sheriff or gaoler pained his prisoner;[3] and too great pain or duress was punished capitally.[4] And it was deemed an indictable offence at common law for a gaoler to punish his prisoner too heavily, or to confine him in a dungeon without cause, for there can be no prison within a prison; and the walls of the prison, if not high enough, must be made higher, rather than allow the gaoler to chain or iron the prisoner.[5] Hence if a gaoler treated a prisoner inhumanly and caused death, he was held guilty of murder, for it was not necessary that any stroke should be given to produce this effect.[6] But notwithstanding the most satisfactory theories, the practice in England, as elsewhere, was the worst possible. In 1661, it is related that when a prisoner was committed to the Gatehouse, Westminster, for libel, and had been locked up three nights in a room without

[1] 28 & 29 Vic. c. 126, sch. [2] Cod. Theod. [3] 1 Ed. III. st. 1, c. 7. [4] 14 Ed. III. st. 1, c. 10. [5] 17 St. Tr. 298. [6] Ibid. 453.

chair or table, a sum of 7*l.* 15*s.* was demanded for present fees, that is to say, 5*l.* to excuse him from wearing irons, the other items being for entrance, week's lodging, sheets, garnish money, and for turnkey fees.[1] And the gaoler practically could enforce his will in the most tyrannical way. When the House of Commons Committee, in 1728, inquired into the subject, they found that the thumbscrew and torture were used at the pleasure of the gaoler, and prisoners before trial were loaded with irons. Since Howard laid bare prison life to the astonishment of mankind, prisons have, it is true, been comparatively models of fair and considerate treatment.

Treatment of prisoners before trial.—Prisoners before trial are kept apart from convicted prisoners. Their legal advisers are allowed to have reasonable times of access. Such prisoners have the option of employment, but cannot be compelled to perform any hard labour; and if having so laboured they are acquitted, an allowance is made for their earnings. They may procure for themselves food and malt liquor, clothing, bedding, and other necessaries, subject to rules approved by the justices, but such cannot be sold or transferred to any other prisoner. If they do not provide their own food, they may get an allowance from the prison store. They may with their own consent wear the prison dress, and must do so, if their own are unfit for use or require to be preserved for purposes of justice; but their prison dress shall be of a different colour from that of the convicted prisoners.[2]

Instruction and visits to prisoners.—When a prisoner is admitted, he is searched, and all articles which would facilitate his escape are taken from him, and his money and effects are also taken and kept for him by the gaoler. A record is kept of his name, age, features, and state of health. A female prisoner's hair shall not be cut without her consent. Those who are sick and infirm are kept in the prison infirmary. All may be instructed in reading, writing, and arithmetic, so as not to interfere with the labour. Visitors to prisoners may be admitted at times appointed by the justices, subject to restrictions as to the communication, and any visitor's name and address may be demanded,

[1] R. v. Smith, 7 St. Tr. 947.

[2] 28 & 29 Vic. c. 126, sched.

and the visitor may be searched if there is ground of suspicion.[1]

The common law supplied no rule whatever as to the right of a prisoner to be visited by his friends. A statute of 1791 authorised, however, the justices to visit all prisoners. Holt and Lord Raymond held, that neither a wife nor a relative of a prisoner could insist on visiting him. They were, as Lord Eldon put it, the king's gaols, and he alone could make what regulations he pleased as to the management.[2] In 1817 a question arose in parliament whether the intercepting of letters from prisoners to a member of parliament was not a breach of privilege; but the House of Commons held it was not.[3]

Food of prisoners how far restricted in gaols.—Convicted prisoners are not allowed to have wine, beer, or other fermented liquors, except by order of the surgeon, and are not allowed any other than the prison allowance. No smoking is allowed except by consent of the visiting justices or order of the surgeon. Prisoners must wear the prison dress, and on discharge their own clothes are returned to them. Every male prisoner must sleep in a cell by himself, but under special circumstances he may sleep in a separate bed in a cell containing other male prisoners. No gaming of any kind, with dice, cards, or other instruments is permitted.

Prisoners and religious instruction.—Every prison must have a chapel or a room used for a chapel. And there the chaplain reads prayers every day, and on Sunday performs the usual service of the Established Church. The criminal prisoners must attend this service, unless they are of a different religious persuasion; and facilities are given for ministers of their own persuasion attending at intervals.[4]

Treatment of prisoners sentenced to death.—When a prisoner is sentenced to death, he is confined in a cell apart from all other prisoners, and an officer night and day watches the cell. The chaplain or a minister of the religious persuasion of the prisoner has free access, but no other person can visit him without an order of the visiting

[1] 28 & 29 Vic. c. 126, sched. [2] 36 Parl. Deb. 874. [3] 6 Parl. Deb. (2nd) 660. [4] 28 & 29 Vic. c. 126.

justices.[1] The sheriff has the charge of carrying into effect the sentence of the court.[2]

Banishment as a punishment.—It seems to be a practice adopted in one form or another by most nations to use banishment as a punishment. Banishment was prohibited by Magna Charta, except by some sentence of a court of law;[3] but this shows that it was deemed a grievance at that time. And, as already shown, the sovereign could at one time prohibit subjects leaving the kingdom without leave.[4] In the time of Edward I. abjuration was a species of banishment. The abjuration of thieves was regulated by statute. The offender was bound to haste to the port assigned, with a cross in his hand, turning neither to the right nor to the left out of the king's highway; and every day he was to wade in the sea to the knees and try and assay a passage, and after forty days return to a church.[5] This practice of abjuration was revived and continued at a later stage under the form of transportation. The practice of banishing convicted persons by way of punishment, as it became known in recent times, began in the time of Elizabeth as a mode of getting rid of rogues, some of whom were also sent to the galleys.[6] And it is said to have been suggested by the many adventures and piracies of that time.[7] In 1680 a power was given to the judges to execute or to transport to America for life the mosstroopers of Cumberland and Northumberland.[8] But transportation was not treated as a regular punishment till the restoration of Charles II., and then convicts were sent to settlements in North America, not as perpetual slaves, but indentured for seven years; and in the last three years they received wages. The American revolution checked this practice. Then imprisonment on board hulks was introduced, and an act allowed transporta-

[1] 28 & 29 Vic. c. 126, sched. [2] 28 & 29 Vic. c. 126, § 58. See *post* as to execution of punishment under 31 & 32 Vic. c. 24.
[3] Mag. Ch. c. 39; Joh. c. 242. See also *ante* p. 136.

[4] The punishment of ostracism at Athens and petalism at Syracuse was a mode of summarily getting rid of a person deemed dangerous, and any one suspected for his authority or envied for his wealth was banished for ten years.—*Plut. Nic.* And the ancient Greeks added a curse to the banishment.—*Plut. Alcib.*

[5] Stat. Wall. 12 Ed. I.; 1 Stat. Realm, 250. [6] 39 Eliz. c. 4.
[7] 2 Pike on Crime, 109. [8] 18 Ch. II.

tion to any part of the world. A system of penitentiaries was established under the influence of Blackstone, Lord Auckland, and Howard, but for thirty-six years it remained a dead letter.[1] Then the idea grew up to make a colony of convicts at New South Wales.[2] But after a long and fair trial the system did not work satisfactorily, and interfered with the social life of colonies. Transportation, moreover, failed in its main object, namely, in deterring by fear of punishment.[3] In 1857 it was finally abolished, and transformed into penal servitude.

Penal servitude as a punishment.—When transportation began to be discontinued, penal servitude was gradually substituted for it; and in 1853 it was provided, that those terms of penal servitude should be according to a scale which made the substituted punishment shorter.[4] It was also enacted, that persons sentenced or ordered to penal servitude, might be kept to hard labour in the usual prisons of the kingdom.[5] Transportation as a sentence was finally abolished in 1857, and the smallest term for penal servitude was fixed at three years.[6] But in 1864 the *minimum* sentence of penal servitude was raised to five years; and in all cases where the prisoner had been previously convicted of felony, and committed another crime which was also punishable in the same way, then the *minimum* term of the second punishment was declared to be seven years penal servitude.[7] And as to offences against discipline in convict prisons, the secretary of state was authorised by warrant to appoint two justices, who might from time to time direct that for such offences corporal punishment shall be inflicted.[8]

It is now one characteristic of the punishment of penal servitude and imprisonment in a large variety of misdemeanours, that it may be superseded by a fine; for the legislature in recent years has enacted, that in lieu of any punishment for indictable misdemeanours under the Larceny Act, under the Malicious Injuries Act, and under the Forgery Act, the court may fine the offender, and require him to enter into his own recognisances and to find sureties, both or either for keeping the peace and being of

[1] 19 Geo. III. c. 74; Sel. Com. 1811. [2] 16 Parl. Deb. 944. [3] Whateley, Essays. [4] 16 & 17 Vic. c. 99. [5] Ibid. § 6. [6] 20 & 21 Vic. c. 3, § 2. [7] 27 & 28 Vic. c. 47, § 2. [8] Ibid. § 3.

good beheaviour.[1] In indictable felonies, however, no such power of substitution is allowed.

Various kinds of penal servitude have existed in most countries. By the Gentoo code a certain tribe were condemned to penal servitude and to live in filth, and to act as public executioners.[2] In Siam those condemned for petty offences, were made to cut grass for the elephants, or to be beaten with bamboos.[3] The galley slaves, known from the fourteenth century, as being condemned by various states adjoining the Mediterranean, were criminals bound to serve for a term of years or for life. They were chained to their rowing benches, night and day, giving their services compulsorily to the state. The galleys were abolished in France in 1748. And a statute of Elizabeth, as already noticed, had once directed dangerous rogues to be sent to the galleys of the realm.[4]

Tickets of leave dispensing with penal servitude.—A mitigation of long terms of punishment has been introduced in modern times. The practice of remitting part of the period had been adopted while sentences of transportation were in force, by means of a licence allowing the convict to be at large in the United Kingdom subject to certain conditions, on breach of which he was again liable to be remitted to the original custody.[5] And when, in 1857, penal servitude was substituted for transportation, the same practice was continued.[6] These licences were subjected to more stringent rules in 1864, and it is provided, that on a subsequent conviction the licence shall be forfeited.[7] The main conditions of this licence are, that the holder is not to associate with notoriously bad characters, nor lead an idle and dissolute life, without visible means of obtaining an honest livelihood. And he is bound to report himself once a month to the chief constable of the district where he lives or to which he removes.[8] On failing to produce his licence to any magistrate or constable when required, he is liable for that refusal to three months imprisonment. And a constable can at any time arrest him without warrant, if reasonably suspected of having

[1] 24 & 25 Vic. c. 96, § 117; c. 97, § 73; c. 98, § 51. [2] 7 Maurice, Ind. Ant. 369. [3] 9 Pink. Voy. 594. [4] 39 Eliz. c. 4. [5] 16 & 17 Vic. c. 99, § 9. [6] 20 & 21 Vic. c. 3. [7] 27 & 28 Vic. c. 47. [8] 34 & 35 Vic. c. 112, § 5.

committed any offence, or having broken any of the conditions of his licence.[1] Moreover, if at any time the holder of a licence is believed by the chief constable to be getting his livelihood by dishonest means, the latter may authorise a constable, without warrant, to arrest him, and a magistrate may, on inquiry, forfeit the licence.[2] And if a licensee be charged at any time with breaking the conditions of his licence, a magistrate may for that offence commit him to prison for three months.[3] And failure for forty-eight hours to notify his change of residence, or to report himself once a month to the chief constable, is punishable with one year's imprisonment.[4]

Hard labour as part of sentence of imprisonment.—Whenever hard labour is part of the sentence of imprisonment, this labour consists of two kinds. One is hard labour of the first class, which is work at the treadwheel, or stone-breaking. The other is hard labour of the second class, being some bodily labour appointed by the justices with the approval of the secretary of state. And some of the necessary services of the prison may be given as a reward for industry and good behaviour, and will count as labour of the second class.[5] Every male prisoner of sixteen years of age, during the first part of his sentence, unless the term is short, is kept at hard labour of the first class for six to ten hours daily; and during the latter part of the sentence is kept at hard labour of the second class. All male prisoners under sixteen years of age and female prisoners are kept at hard labour of the second class. No prisoner is compelled to work on Sundays, Good Friday, Christmas Day, or fasts and thanksgiving days.[6] All prisoners convicted of misdemeanour and not sentenced to hard labour are divided into two divisions, one of which is called the first division; and any court or judge sentencing a misdemeanant to imprisonment without hard labour may order that he shall be treated as a misdemeanant of the first division, and this order has the effect of exempting the prisoner from treatment as a criminal prisoner.[7]

Some disgraceful misdemeanours were expressly made punishable with hard labour. Thus whenever a person is convicted of public cheating, or conspiracy to cheat or

[1] 34 & 35 Vic. c. 112, § 5. [2] Ibid. § 3. [3] Ibid. § 4. [4] Ibid. § 5. [5] 28 & 29 Vic. c. 126, § 19. [6] Ibid. sched. [7] Ibid. § 67.

to defraud, or to extort money, to falsely accuse of crime, or to obstruct, prevent, or defeat the course of public justice: of an escape or rescue from lawful custody, of indecent exposure of the person, of indecent assault, or any assault occasioning actual bodily harm, of an attempt to have carnal knowledge of young females, of exposing or selling obscene books or pictures—in all these cases the judge may add to the other punishment of imprisonment the punishment of hard labour, during the whole or any part of the imprisonment.[1] And whenever solitary confinement may be awarded for any indictable offence under the Larceny Act, the Malicious Injuries to Property Act, and the Forgery Act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year.[2]

Solitary confinement as a punishment.—Solitary confinement is a refinement of punishment, and is never used as a substantive punishment, being only a part of the discipline of prisons. No one can now, in any case, be kept in solitary confinement for more than one month at a time or more than three months in any one year.[3] And the same kind of punishment is, as will be seen, limited in military and naval imprisonments.

Punishment by pains to the body short of death.—All varieties of the punishment of imprisonment have now been described. These are, so to speak, unaccompanied by any positive pain to the body, the worst of it consisting in the mere incapability of locomotion, and that exceedingly mild description of inconvenience, which consists of compulsory labour. We now come to those punishments which consist in some degree of positive pain to the body, whether this was whipping, or putting in the stocks, or mutilation, or some one of many varieties of killing the body and making an end of the prisoner. It was adopted as a leading maxim embodied in the Bill of Rights, that no cruel punishments were to be inflicted; but as no definition of cruelty was given, a vast and extensive field for malignant ingenuity was left unprotected. Corporal

[1] 14 & 15 Vic. c. 100, § 29. [2] 24 & 25 Vic. c. 96, § 119; c. 97, § 75; c. 98, § 53. [3] 1 Vic. c. 90, § 5.

punishment was with the ancient Romans peculiarly the punishment of slaves, as distinguished from freemen. But in modern countries there seems to have been no clear distinction observed. And so far back as the time of Richard II., offenders in matters of false weights were ordered to be punished corporally instead of by fine.[1] And it will be seen, that the pillory and whipping were for centuries favourite modes of inflicting bodily punishment.

Philosophers have observed, that excessive physical suffering as a punishment tends to lessen the sense of shame in the sufferer himself, and raises in the spectator that of indignation and censure.[2] And the experience of centuries shows how we have withdrawn step by step from the barbarous, rough, and brutal pains, which the perverted ingenuity of all times and ages has delighted in assigning to almost every wrong of a criminal complexion.

Whipping and scourging as a punishment.—Nothing, perhaps, is a more natural punishment than scourging or whipping the body. The common punishment prescribed by the law of Moses for minor offences was stripes or beating with a stick. The offender was stripped to the waist, his hands tied to a pillar, the officer standing on a stone behind, lashing the back and breast with thongs, in presence of the judges, who recited certain verses during the operation.[3] The stripes were not to exceed forty, and if the offender died, it was deemed a visitation of God.[4] In Turkey a usual mode of inflicting corporal punishment was by beating the soles of the feet. In China the smaller or the larger bamboo was used for whipping, and was made of a certain length and weight in order to inflict a uniform degree of pain.[5] Many punishments were inflicted by the Christian emperors upon heretics and schismatics, these being of various kinds but generally including scourging.[6] In Italy, and particularly Naples, it was said that a method of punishing pickpockets was the strappado. It consisted in raising the offender with a crane, then suddenly letting him fall, so that the weight of his body fell on his arms, and generally dislocated them at the shoulder. A surgeon then reset the

[1] 13 Rich. II. c. 8. [2] Humb. Gov. c. 13. [3] Deut. xxv. 3.
[4] Seld. De Syn. b. ii. c. 13. [5] 1 Benth., Works, 415.
[6] Gothofred ad Cod. Theod. lib. xvi. tit. 5, De Heret.

arms.[1] In Denmark, in the time of Howard, there were whipping posts in conspicuous stations.[2] Howard related that when in Russia he found that the executioner, who administered the knout, could kill his victim with ease, according to the way in which he handled the whip at each stroke.[3] In Korea, the offender had his great toes tied together, and the soles of his feet were bastinadoed with a cudgel as thick as a man's arm.[4]

England was not behind the rest of the world in this matter. In 1637 Lilburn was, for refusing to answer interrogatories, ordered by the Star Chamber to be tied to a cart and whipped from Fleet Prison to Westminster, where he was put in the pillory, and was gagged for an hour and a half; and he had 500 lashes in the course of the journey.[5] Titus Oates, after being sentenced to be set in the pillory four times a year, was ordered to be whipped by the common hangman from Newgate to a great distance.[6]

Among the ancient Persians, instead of whipping the criminal himself, his garments only were whipped.[7] And in Japan criminals were executed sometimes only in effigy.[8]

Whipping of males under sixteen, and how far restricted.—After centuries of reflection, we still adhere to whipping as a salutary punishment in some instances. This in modern times is not, however, used as the only punishment, but at most is only one ingredient; and it is confined to a few crimes, and to males under the age of sixteen.[9]

[1] 1 Benth. W. 413. [2] Dixon's Howard, 295. [3] Ibid. 303. [4] 7 Pink. Voy. 539. [5] 3 St. Tr. 1328, 1349. [6] 10 St. Tr. 1078. [7] Plut. Anax. [8] 4 Univ. Mod. Hist. 16.

[9] Such are the following offences: letters threatening to murder; causing bodily injury, or attempting to do so, by gunpowder, or explosive substances or corrosive fluids; placing gunpowder, &c., near a building or ship, with intention to injure; using gunpowder, &c., to commit felonies; placing stones, &c., on railways to endanger the safety of passengers; stealing and decoying children under the age of fourteen years.—24 & 25 Vic. c. 100.

Offences relating to theft: simple larceny and like offences as to inanimate property, larceny of deer, and resisting deer-keepers; stealing, destroying, and damaging fixtures and trees in pleasure grounds; damaging trees elsewhere, and fruits or shrubs in gardens, only after a second or third offence; sending letters demanding money, and threatening to accuse of crime: larceny, or embezzlement by clerks or servants; tenants stealing landlords' fixtures; receiving stolen goods, taking rewards for recovering stolen property.—24 & 25 Vic. c. 96.

In all such cases, though whipping may be ordered as part of the punishment of a male under sixteen, it must be a private whipping, and once only. Moreover the sentence of the court must specify the number of strokes, and the instrument with which they are inflicted.[1] And still further limitations are defined in the case of whipping juvenile offenders. Whenever whipping is ordered by a justice or justices of the peace, as part of the punishment in their exercise of summary jurisdiction, the sentence shall not only specify the number of strokes and the instrument, but if the juvenile is under fourteen, then the strokes shall not exceed twelve, and they must be inflicted with a birch rod, and no offender shall be whipped more than once for the same offence.[2]

Whipping of adult males how far restricted.—But though whipping is a punishment now usually confined to males under sixteen years of age, there are two offences singled out for this treatment, whatever be the age of the offender. One of these is the offence of robbery, or of assault with intent to rob, the assailant being armed with an offensive weapon.[3] The other is the offence of strangling or choking persons with intent to commit an indictable offence.[4] Whenever a person is convicted of either of these offences, the court may, in addition to the other punishments, direct that the offender, if a male, be once, twice, or thrice privately whipped. But this is subject to the following conditions; 1, that if the offender is under the age of sixteen, the number of strokes at each such whipping shall not exceed twenty-five, and the instrument used shall be a birch rod; 2, that in the case of other

Malicious injuries to property; setting fire to churches and chapels, houses, buildings, or goods therein; attempting to set fire to buildings; damaging or attempting to damage buildings with gunpowder; destroying goods in process of manufacture, machinery, crops, stacks, hops, trees, vegetables, fruits in gardens; setting fire to mines, or attempts; drowning mines; damaging steam engines therein; destroying sea-banks, dams, drains, ponds, &c., destroying bridges; placing wood, stones, &c. on railway, with intent to obstruct; destroying works of art or curiosity; setting fire to ships, or attempts; damaging ships, exhibiting false signals, cutting adrift boats; sending letters threatening to burn houses, &c.—24 & 25 Vic. c. 97.

[1] 24 & 25 Vic. c. 96, § 119; c. 97, § 75; c. 100, § 70. [2] 25 Vic. c. 18, §§ 1, 2. [3] 24 & 25 Vic. c. 96, § 43. [4] Ibid. c. 100, § 21.

offenders the number of strokes shall not exceed fifty-eight at each whipping. 3 That the court shall in its sentence specify the number of strokes, and the instrument to be used in inflicting them. But no whipping can take place more than six months after the sentence, and if penal servitude be part of the punishment, then the whipping is to be inflicted before the offender is removed to the convict prison to undergo such sentence.[1]

Whipping of females no longer allowed.—The degrading character of the punishment of whipping, as was urged in parliament, made it no longer justifiable in the case of females. At last, in 1820, the whipping of women was wholly abolished.[2] It was, however, necessary to provide for those cases in which previous statutes had often imposed that mode of punishment on persons of both sexes. Accordingly in all cases where statutes, before 1820, directed whipping of females to be an ingredient, or to constitute the whole of the punishment, any court is now obliged to substitute either imprisonment and hard labour from one to six months, or solitary confinement not exceeding seven days.[3]

This enactment, it is true, applies only to punishments which had been declared by statutes before 1820, and if any statute subsequent to that date has decreed the whipping of females, such punishment will still be lawful. But modern statutes have usually declared the punishment of whipping to be inflicted on adult males, and generally on males under a certain age, such as fourteen or sixteen. One offence, however, exists, namely, where a person points fire-arms or throws offensive materials at the sovereign: and this may be punished with imprisonment and whipping, whether the offender be male or female.[4]

Military punishments by pains to the body.—It was only to be expected, that military persons should be punished somewhat differently from civilians, owing to the different duties required. It was said, that the flogging of soldiers for misdemeanour was abolished at the instigation of Drusus.[5] And Augustus Cæsar made one mild punishment consist in the soldier standing all day before the prætorium, or

[1] 26 & 27 Vic. c. 44. [2] 1 Geo. IV. c. 57, § 1. [3] Ibid. § 3.
[4] 5 & 6 Vic. c. 38, § 2. [5] Plut. C. Gracch.

carrying poles and turves.[1] But the Romans awarded for desertion beating and stoning to death. In ancient times in our own country there were also the most noticeable military punishments. In the time of Richard I. the loss of a right hand or an ear was the sentence for striking a fellow soldier. Till the reign of Queen Anne the tongue was bored with a hot iron as a punishment for blasphemy. Infantry soldiers were sentenced to ride the wooden horse, a painful mode of jostling the body. The picket was used as an instrument for bringing exquisite pain to the wrist and the heel alternately, according as the weight of the body rested on one or the other member, the offender being often sentenced to stand thus for a quarter of an hour.[2] To run the gantelope was a mode of making each soldier act as an executioner, by inflicting a stroke of the cat-and-nine-tails on the culprit as he passed in front of them. Imprisonment in a black hole, with nothing but bread and water for subsistence, was also used. To be drummed out of the regiment with a halter tied round his neck, a label denoting his crime fixed to his back, and a final ignominous kick following on corporal punishment, was used in many cases. Whipping, however, was the punishment which survived all the others.[3]

All these varied corporal punishments have been gradually abolished, and scarcely any remain. By the Mutiny Act no court martial can sentence a soldier to corporal punishment except when on active service in the field, and then only for mutiny, insubordination, desertion, drunkenness on duty, disgraceful conduct, or any breach of the articles of war; and no sentence of corporal punishment shall exceed fifty lashes.[4] And solitary confinement when ordered is subject to the same limitation as for non-military offenders.[5]

Naval punishments by pains to the body.—The navy was not behind the army in the variety of its ancient barbarous punishments. In 1635 a captain of the navy could put a sailor in the billbows; during pleasure; keep him fasting; duck him at the yardarm; or haul him from yardarm to yardarm under the ship's keel; whip him while tied to the capstan; and, while the sailor was tied at the capstan or mainmast, the captain could hang weights

[1] Suet. Aug. [2] 30 St. Tr. 481. [3] Grose, Mil. Antiq. 200.
[4] Mut. Act, § 22. [5] Ib. § 23.

about his neck, till his heart and back were ready to break; and could gag, or scrape his tongue, for blasphemy or swearing.[1] But when courts martial were instituted by the Long Parliament, these arbitrary and cruel punishments were greatly checked.[2]

When the law relating to the discipline of the navy was revised in 1866, one of the punishments allowed was corporal punishment; but it was at the same time enacted that not more than forty-eight lashes shall be inflicted: no officer shall be subject to it: and no petty or noncommissioned officer shall be subject to it except in case of mutiny.[3] But in all cases, when imprisonment is the ordinary punishment, corporal punishment may be substituted for it.[4] In the case of solitary confinement, this cannot be ordered for more than ten days at a time, and there must be intervals of not less than seven days between two successive periods of such confinement.[5]

Punishment by branding the face or body.—It has been said that the brand of infamy as a punishment should be wholly excluded, for a man's honour or the good opinion of his fellow citizens is something which lies wholly beyond the reach of the political power.[6] Yet this atrocious punishment seems to have been fixed upon in the most ancient times, and was long persevered in. The laws of Moses were conspicuous for omitting to prescribe any branding or other indelible mark on the body of criminals; and there was reason to believe, that when the punishment of extirpation from his people was imposed on a prisoner, this meant either death or exile.[7] The law of Moses did not prescribe imprisonment as a punishment, but this has been supposed to be on account of the want of suitable prisons;[8] and yet such a punishment seems to have come into use afterwards.[9] By the institutes of Menu, certain marks were burned on the forehead denoting such crimes as murdering a priest or stealing sacred gold.[10] It was also in Japan a mode of punishment.[11] And by the Chinese code all thieves were branded on the arm with

[1] Mons, Nav. Tracts, 293. [2] 4 Com. J., 118; 13 Ch. II. c. 9. [3] 29 & 30 Vic. c. 109, § 53. [4] Ib. § 55. [5] Ib. § 56. [6] Humboldt, Govt. c. 13. [7] Michaelis, Com. § 237. [8] Ibid. 238. [9] Jerem. xx. 2; xxxviii. 6. [10] 8 W. Jones, 41. [11] Dickson's Japan, 246.

the word 'thief,' and to deface such mark was a capital offence.[1] In Ava a mark was burned on the face of thieves, and the word thief worked on the breast.[2] By the old Roman law of the Twelve Tables a false witness was cast headlong from the top of the Tarpeian rock.[3] In later times he was burnt in the face and marked with the letter K, denoting him to be a calumniator or false accuser; whence honest men were, by contrast, described as *homines integræ frontis*.[4] Constantine, however, put this practice of mutilating criminals in a new view. He had so great a regard for the human face as being the image of the Divine Majesty, that he would not suffer any mark of infamy to be set upon it. He decreed, that a criminal, who was condemned to fight with wild beasts, or to dig in the mines, should not be branded in the face, but only on the hands or legs, so that the human face divine might not be disfigured.[5]

In our own law branding was adopted as a means of punishing, or at least identifying certain criminals, and as will be seen, was long adhered to as a certificate of the benefit of clergy. A fugitive labourer was ordered to be burned in the forehead in the time of Edward III.[6] And sturdy beggars were sometimes treated in this fashion. Those murderers who were once admitted to clergy were in the time of Henry VII. branded with the letter M on the left thumb, and if convicted of other felonies with the letter T.[7] A forger was at a later date branded on the nose.[8] The punishments of the Star Chamber were the rack, the pillory, the stocks, whipping of women, cutting off and nailing of ears, the slitting of noses, the branding with a hot iron on the nose and cheek, ducking in a cucking stool, and riding with the face to the horse's tail.[9] The most memorable instance of branding in this country was that of the letters S L, for seditious libeller, branded on Prynne's cheek at the instigation of Archbishop Laud. Nayler was, besides the pillory and whipping, burnt in the face; and had his tongue bored with red hot iron.[10] A statute of William III. at last disclosed the misgivings of

[1] Staunton, Code, 285. [2] 9 Pink. Voy. 438, 494. [3] Aul. Gell. Noct. Attic. lib. xx. c. 1. [4] Digest, lib. xlviii. tit. 16, leg. 1; lib. xxii. tit. 5, leg. 13. [5] Cod. Theod. 9, 40, 2. [6] 34 Ed. III. c. 10. [7] 4 Hen. VII. c. 13. [8] 5 Eliz. c. 14. [9] Burn's Star Chr. [10] 5 St. Tr. 802.

the legislature on this subject. It recited, that the more conspicuous was the brand, the more abandoned was the criminal.[1] And a statute of Anne recited, that such offenders, being rendered thereby unfit to be intrusted in any honest and lawful way, only became more desperate. Branding has been wholly abolished as a punishment, because the old statutes authorising it have been repealed, and such offences as still survive are now punished in a different way, under statutes, all which have been rewritten.

Punishment by mutilation of the body.—Though the mutilation of the body seems to modern eyes the least justifiable of all punishments, it was that which found most favour with the ancients. It has already been seen how it was long tried under the *lex talionis*. But as a separate punishment, it also long held a place in the laws of nearly all countries. In all ages the usual Oriental punishments have been mutilation by cutting off the ears, or the nose, or the tongue, or blinding the eyes.[2] The nose was cut off in ancient Egypt for adultery;[3] and the hand was cut off for use of false weights and measures.[4] At Algiers a robber's right hand was cut off and hung round his neck, and he was made to ride on an ass with his face to the tail.[5] St.

[1] Barringt. Stat. 444. [2] Herod. iii. 69, 154; vii. 18; Xen. Anab. i. 9, § 13; Amm. Marc. xxvii. 12; Procop. De Bell. Pers. i. 11. [3] Diod. Sic. b. i. c. 8. [4] 2 Kenr. Egypt, 55.

[5] 7 Univ. Mod. Hist. 216. By the laws of Menu, amputation of the hands or two fingers was the punishment of thieves.—8 *W. Jones*, 48, 100. The Gentoo code broke the hand, nose, and teeth of fraudulent silversmiths, or cut them to pieces with a razor. Burglars had their hands cut off, and were then crucified. Highway robbers were strangled. Man-stealers were swathed with grass and then burnt alive, or stretched on a hot plate of iron. Elephant and horse stealers had a hand and foot cut off before being killed. And any person who stole even a small animal, except a cat or a weasel, had half his foot cut off. Even Brahmins, who never suffered death when guilty of stealing, were marked on the forehead with a hot iron, or had their eyes put out, or their hair cut off.—*Gentoo Code*, c. 17. And adultery and rape were punished with mutilation and burning, while, if it was a Brahmin's wife, she was made to ride naked on an ass through the whole city, then to be eaten by dogs.—*Ibid.* c. 18. Among the Incas the ringleaders of a treasonable plot were sentenced to have two of their upper and two of their lower teeth extracted, and also those of their descendants for ever, as a mark of their treachery.—*Com. of Incas*, b. ix. c. 3.

Lewis of France made a law directing blasphemers to have their tongues pierced with a red hot iron; and Lewis XIV. for a sixth offence of that kind ordered the upper lip to be cut off, and for the seventh offence the tongue to be cut out.[1] In 1279, Philip of France substituted a fine for the amputation of the right hand in case of striking the mayor or a peer.[2]

English laws as to mutilation as punishment.—In the laws of King Alfred, Athelstan, Cnut, and Henry I., mutilation was a common punishment.[3] The right hand of the coiner was struck off.[4] The mutilation of criminals was also recommended by the laws of William the Conqueror as a perpetual warning to the ill-disposed,[5] though in a synod held in London in 1075, under Archbishop Lanfranc, this view was condemned.[6] An ordinance of Edward I., on a third offence of stealing lead from Derbyshire mines, ordered a knife to be stuck through the thief's hand, and that he should be left till he cut off this hand to release himself. The *Mirror* says that cutpurses and persons stealing less than the value of twelve pence, had one ear cut off, without their being carried to gaol.[7] To write libels against the king or queen subjected the offender in the time of Mary and Elizabeth to the loss of the right hand.[8] And for spreading rumours against the queen both ears were cut off, or a heavy fine was imposed.[9] It is said, that the court, in Elizabeth's time, sentenced a man to have his right hand cut off for throwing a stone at a judge.[10] In the same reign, for forgery of deeds, the convicted offender, besides standing in the pillory, had his ears cut off, his nostrils slit and cut, and seared with a hot iron, so as to remain for a perpetual mark of his falsehood.[11] The left hand was amputated for exporting sheep.[12] The Welsh laws of the sixteenth century also still authorised the cutting off of a limb as a punishment.[13] It is said that Felton, when condemned to death for stabbing the Duke of Buckingham, asked, that he might be sentenced to have

[1] Volt. Becc. c. 5. [2] 3 Guiz. Civ. Fr. Appx. [3] Anc. Laws of Eng. [4] Ethelst. L. 88. [5] Anct. Laws; Leg. W. Conq. iii. 17. [6] Wilk. Conc. i. 363; Giles, Op. Lanfr. i. 307. [7] Mirror, c. 4, § 21. [8] 1 & 2 Ph. & M. c. 3, § 4. [9] 23 Eliz. c. 2. [10] 3 St. Tr. 372; see *ante*, vol. i. p. 318. [11] 5 Eliz. c. 14 [12] 8 Eliz. c. 3. [13] Welsh, L. b. xiv. c. 14.

his hand cut off; but the court said this could not be ordered, for by 25 Edward III. the sentence must be the same for all murders.[1]

Pillory, stocks, and exposure as a punishment. — No punishment seems to have been more thoroughly appreciated, admired, and maintained among mankind as the perfection of reason than the pillory; and from the universality of its acceptance throughout the world, its ingenious varieties, and constant and uniform tendency, it approaches as near as possible to a law of nature. In order to attract the greatest contempt in the most public and conspicuous way upon an offender, to rivet the gaze of the rabble upon him, and to expose him helplessly to their derision, their kicks and cuffs, few implements so rude as this in structure have done so much rough work in their time. And yet modern civilisation utterly recoils from its whole *rationale*, its beginning, its middle, and its end. Cook said that the pillory was a punishment first invented for "mountebanks and cheats, that, having gotten upon banks and forms to wrong and abuse the people, were exalted in the same kind, to stand conspicuous to the view and open shame of the people."[2] This was ingenious, but not quite correct. The pillory was usually a combination of planks put so as to inclose the head and feet and hands of the prisoner in a fixed position, so as to be exposed to the public gaze, and so as to attract public contempt; and a licence was allowed to bystanders, which was largely taken advantage of, to throw filth and rubbish at his head. In China and other countries a portable pillory or cage, called the cangue, was used, consisting of a wooden collar, which the delinquent was made to carry for a prescribed period and distance each day, and to sleep in it at night, and so close fitted that the hand could not be raised.[3]

[1] 3 St. Tr. 372. Even Bentham recommended as punishment for deceit or forgery the transfixing of the hand or tongue of the culprit. —*Ration. of Pun.* But he must have forgot that his predecessors had tried that and much more. [2] 3 St. Tr. 1354.

[3] 8 Pink. Voy. 505; 3 Univ. Mod. Hist. 590. In China the offender was also often built into a tightly fitting brick wall near the highway, and there watched by guards, and every passenger was commanded to spit upon him.—8 *Pink. Voy.* 505.

By the laws of Menu, all prisons were placed near a public road, that offenders might be seen wretched and disfigured.—8 *W. Jones*, 49. So

This punishment of the pillory was very early in full working order in England. Coke says it was used by the Saxons.[1] Fraudulent bakers and butchers were specially ordered by the assize of bread and of bakers to be set in it;[2] and in that age probably all nations deemed it the suitable punishment for false weights and measures. And when it became urgent to deal with runaway servants and labourers, the duty was imposed on every vill to provide stocks, a milder punishment of the same class.[3] In London a fraudulent baker was drawn on a hurdle through Cheapside in his stockings, with a light loaf hanging round his neck.[4] A perjurer was ordered to stand on a stool at Guildhall, and proclaim aloud his offence.[5] While a brothel-keeper, and an adulterer, with their heads shaved, and a courtesan with a peculiar dress, were escorted by a band of musicians, the two first to the pillory, and the last to the cucking-stool.[6] Owing to the way in which the pillory was used in 1535, and probably long after, the ears of the offender were so nailed to it, that by moving they were torn off.[7] The court of Star Chamber, with an addition *ejusdem generis*, condemned a perjurer to go thrice round Westminster Hall, and thrice at Cheapside market, and also at assizes, with a paper round his neck, inscribed, "This man is wilfully perjured."[8] And this wearing of papers was long practised as an appropriate addition to the punishment. Nayler was sentenced to be put in the

in Japan, a decapitated head was put in a box for exposure.—*Dickson's Japan*, 246. In Siam prisoners were not maintained by the state, but chained, seven of them together, with their heads fixed in a ladder, and then ordered to go about and beg their food as they best could, and were obliged each to call out at intervals his name, and what he had been punished for.—9 *Pink. Voy.* 594. The Romans often made a convicted slave go round the neighbourhood carrying a piece of wood (*furcifer*) attracting derision.—*Plut. Coriol.* In Vienna, at the time of Howard, a fraudulent baker was let down into the Danube inclosed in a cage, and there soused a certain number of times.—*Dixon's Howard*, 264. And in Denmark a criminal was led about the streets inclosed in a wooden cage called the Spanish mantle.—*Ibid.* 295. In Spain the male criminals were obliged to go about wearing this tub like machine, and the women a fiddle machine inclosing their arms.—*Field's Howard*, 452.

[1] 3 Inst. 217. [2] 1 Stat. Realm. [3] 25 Ed. III. st. 2. [4] Riley, Lib. Alb. Pref. 104. [5] Ibid. [6] Lib. Alb. b. iii. p. 4. [7] 2 Pike on Crime, 85. [8] 8 Hen. VIII.; Burn's Star Ch. 43.

pillory and whipped by the hangman to the Exchange, and to wear a paper describing his offence; and at Bristol was made to sit on a horse with his face to the tail, and was publicly whipped in the market-place.[1] So Dangerfield for libel was put in the pillory, ordered to go about Westminster Hall with a paper in his hat signifying his crime, and whipped from Aldgate to Newgate and Tyburn.[2] Fuller also, convicted of libel, was most unmercifully handled by the mob, as he stood in the pillory at Charing Cross and Temple Bar and Royal Exchange.[3] In 1759, when Dr. Shebbeare underwent the punishment of the pillory, he had a livery servant standing beside him, holding an umbrella over his head, which merely rested on the frame; though, as Lord Ellenborough said, the sheriff had not on that occasion done his duty, and was afterwards fined and imprisoned on account of it.[4] The more usual case was for the mob to worry and illtreat the prisoners put in the pillory, and on one occasion, when such prisoners stood near Hatton Garden, though the sheriff himself was in a balcony hard by, the mob pelted and nearly killed the men with stones and oyster shells, or with cabbage stalks.[5] This additional punishment inflicted by the mob was apparently treated as an unavoidable incident of the punishment.[6]

Lord Macclesfield had, in 1719, expressed his disapproval of sending state prisoners to this punishment.[7] In 1770, it was noticed that Wilkes, as a convicted libeller, was spared this part of the punishment. In 1791, Pitt said he dissuaded the government from the too frequent use of the pillory.[8] And Burke had condemned it before that date.[9] In 1812, Lord Ellenborough sentenced a blasphemer to eighteen months' imprisonment, and to stand in it once within each month between twelve and two.[10] And in 1814 the same judge, still unconscious of the way in which public opinion was tending, sentenced Lord Cochrane, who had been convicted of a conspiracy to spread false news, to stand in the pillory.[11] And it is said the last

[1] 5 St. Tr. 802, 818. [2] 11 St. Tr. 503 [3] Fuller's Case, 14 St. Tr. 518. [4] 30 Parl. Deb. 355; 31 Ibid. 1124. [5] R. *v* Macdaniel, 19 St. Tr. 810. [6] 7 St. Tr. 1209; 15 Ibid. 1421. [7] 14 Ibid. 446. [8] 29 Parl. Hist. 590. [9] 21 Ibid. 318. [10] R. *v* Eaton, 31 St. Tr. 958. [11] 3 Campb. C. J. 218.

instance of this punishment was in 1816.[1] When the bill was brought into Parliament to abolish it, Lord Ellenborough said it had existed since 1269, and was most admirable for perjury and fraud; and he and Lord Eldon resolutely defended it.[2] In 1816 the punishment was expressly abolished, except as to perjury and suborning of witnesses. And in other cases that act directed, that, where the pillory then stood as part of a punishment, a fine or imprisonment might be substituted for it by the judge.[3] But in 1837 it was utterly abolished as a punishment for any offence;[4] and it is said, that it had been already abolished in France in 1832.

The stocks as a punishment.—The stocks was a species of punishment analogous to the pillory, though of a less degrading nature, and intended not so much to pain as merely to confine the prisoner. It was obviously only a cheap gaol, or rather an apology for so expensive a structure. Instead of the prisoner going to gaol, this gaol came to the prisoner, and held him tightly till he was released. As already stated, a statute of Edward III. made it incumbent on each vill to have stocks; and a pillory was to be in every liberty.[5] A statute of 1 Edward II. had made a humane provision, that he, who rescued a prisoner should not suffer judgment of life or member, unless the offence entailed that heavy punishment; and that statute was held to apply pre-eminently to the stocks, for though it was usually supplied by the parish or a private person, it was deemed nevertheless to be the king's prison.[6] The stocks was long the convenient punishment for absconding servants and sturdy vagabonds, as has been already noticed in the chapter on Poor Law. But justices of the peace were in 1403 prohibited from imprisoning any one, except in the common gaol.[7] Prisons are now of a massive and solid description, provided by every county and borough; and constables take all persons arrested to the common gaol. The old offences for which the stocks were assigned as a remedy, or one of the remedies, have nearly all been repealed or altered; and no punishment in the stocks has been re-enacted or created during the present century.

[1] 2 Pike on Crime, 377. [2] 31 Parl. Deb. 1126. [3] 56 Geo. III. c. 138. [4] 1 Vic. c. 23. [5] 51 Hen. III. st. 6. [6] 2 Inst. 589. [7] 5 Hen. IV. c. 10.

The act of Charles II., punishing the exercise of a trade on the Sunday, is nearly the only act remaining which ordered the stocks, and which has not been rewritten in modern and more appropriate language. Thus the stocks had decayed simply for want of employment. It has never been positively repealed or prohibited as a mode or place of punishment, but simply ignored at every revision of an old punishment or creation of a new one. Its part has been uniformly and designedly left out in modern enactments. Whether and how far a vill, or a parish, or a leet, was or is bound to provide a pillory or stocks, and a tumbrel for scolding women, is now of no consequence.[1] The punishment of the stocks was practically put an end to altogether in 1848, when another mode of applying the punishment once involving it was provided by the statute regulating justices' procedure.[2]

Capital punishments generally.—After having noticed all the varieties of corporal punishment short of death, we come now to the last and greatest of all, namely, the punishment of death itself—a stage at which all legal processes must stop. Nothing that the law can inflict, nothing that the utmost malice of a private enemy can suggest, can carry matters beyond that extremity ; and yet even in the mode of finishing the body there are, and have been, endless and undiscoverable atrocities by every law, as well as in spite of the law, perpetrated by way of aggravating the horrors of this punishment, and crowding as much misery and agony into the last few days or hours of life, as a perverted ingenuity can devise. And in modern times all governments have been confronted again and again with the irrepressible problem, whether in any case whatever, the law, or even the legislature itself, which is the highest function of the law, has a right, and if so whence derived, and by what process of reasoning, to deprive any human being of his life—a possession which, it has been said, the law did not give, and was never intended to take deliberately away. In treating of this subject, of surpassing interest to all men, and forming the blackest chapter in every code of law, it will be useful to show a few of the leading crimes for which punishment of death has mostly been assigned and the mode of inflicting it, and lastly, what is the

[1] Com. Dig. Leet, K. Tumbrel. [2] 11 & 12 Vic. c. 43, § 19.

stage at which our law, taking up more humane and enlightened views, as to the power of man over men, has at last arrived, and the probable prospect of still further progress in the same direction.

In the practice of capital punishments it has long been the current doctrine, that it is part of the law of God, and as at least deriving much of its justification and authority from the universal custom of nations. A venerable judge and oracle of the law in his time, Justice Foster, in 1749, commenced his sentence of a convicted murderer thus :—" Nothing now remains but that I pass the sentence upon you, which the law of your country, in conformity to the law of God and to the practice of all ages and nations, has already pronounced upon the crime you have been guilty of," &c.[1] And the same preface might equally well have been made, and probably at that epoch and long afterwards was usually made, when sentencing to death a man who had stolen property to the value of twelve pence. It is thus important in this subject to trace the lineage of capital punishment, and see whether the same dignity can be thrown round it, owing to its mere antiquity, as Burke said so enhanced the value of English liberty, which, "had its pedigree and a long line of illustrating ancestors." What the ancients and barbarians did and thought about it, ought to be a useful lesson.

Varieties of the mode of capital punishment.—The law of Moses prescribed two kinds of capital punishment, namely, the sword and stoning. The use of the sword has been deemed by learned men not to involve decapitation, but the first and readiest way in which stabbing and cutting can complete the operation, for as there was in general no professional executioner employed, and the blood avenger performed the work, no rule could be laid down.[2] The death by stoning, which seems to have been the usual mode of execution, was begun by the witnesses and followed up by the people, who seem to have been ready enough to join in any work of this kind. There are also records in the Scriptures of the punishments usual among other nations than the Jews, such as the Chaldæans

[1] R. v Jackson, 18 St. Tr. 1113. [2] Michaelis, Com. § 234.

burning alive,[1] and cutting the body to pieces, limb by limb,[2] and the Syrians strangling and hanging the victims.[3] Among the ancient Persians not only was death the penalty of murder, rape, treason, and rebellion, but also of bribery, of intruding on the king's privacy, or sitting accidentally on the throne.[4] Crucifixion and impalement were their severe punishments.[5] But sometimes the head was crushed, and the brains beaten out on a stone, or the criminal was buried alive; and all kinds of mutilations and scourging were practised for stealing and misconduct.[6] They also fixed the criminal between two boats, and anointed him with honey, that he might be stung to death.[7] Crucifixion was also used in India and Japan for thieves.[8] The ancient Persians, indeed, had an idea, that a criminal should die neither by the sword, hunger, nor poison; and they built a high tower, and filled it with ashes, and precipitated the criminal from the top, turning a wheel to raise the dust and suffocate him.[9] And the Athenians had a deep pit, into which criminals were thrown headlong.[10] The ancient Assyrians are supposed to have reserved the practice of impalement for their most heinous criminals. This consisted in fixing a sharp-pointed stake upright in the ground with its point uppermost, and placing the criminal with the pit of his stomach over the point, so that it entered the body below the breastbone.[11] Another mode was by beating in the skull with maces as the criminal knelt before the executioners.[12] In China, for murder or piracy, the criminal was tied to a stake, and the skin of his forehead cut from ear to ear and pulled over his eyes, when he was delivered up to the friends of the murdered man, to be further tortured at pleasure.[13] In Japan when a man of distinction was convicted, he got a letter from the emperor specifying the day and hour when he must be his own executioner, otherwise dreadful torments would await him; whereupon the doomed man called his friends to a feast, and at the end of it ripped himself up to the breastbone.[14] In Jeddo they laid the

[1] Jerem. xxix. 22; Dan. iii. 6. [2] Dan. ii. 5; Ezek. xvi. 40; xxiii. 47. [3] 1 Kings xx. 31. [4] 4 Rawl. Anct. Mon. 207. [5] Ibid. 141. [6] Ibid. 208. [7] Plut. Artaxerxes. [8] 7 Maur. Ind. Antiq. 331; 4 Univ. Mod. Hist. 16; 1 Perry's Japan. [9] Maccabees ii. c. 13; Val. Max. b. ix. c. 2. [10] Plut. Arist. [11] 2 Rawl. Anct. Mon. 87. [12] Ibid. 88. [13] 8 Pink. Voy. 505. [14] Ibid. 517.

criminal on the ground, held down by two men, and the rest jumped upon him and battered his skull.[1] In Kanara, in India, the man was stripped and exposed to the heat of the sun, that the flies might sting him.[2] In Tunis his body was walled up, and his head rubbed with honey, that wasps and insects might feast on it.[3] The law of the

[1] 4 Univ. Mod. Hist. 72. [2] Dellon, Voy. 154.

[3] 7 Univ. Mod. Hist. 317. Man's inhumanity to man is illustrated by these varieties of cruelty. Among the Gentoos, if a woman poisoned or murdered a man, she had a stone tied round her neck and was drowned; and if the murdered person was a husband, or son, or her spiritual guide, her ears, and nose, and hand, and lips were cut off, and she was trampled to death by cows.—*Gentoo Code*, c. 21. In Tonquin an adulterous wife was trampled to death by elephants. —9 *Pink. Voy.* 723. By the laws of Menu peculiar severity was decreed against the fraudulent goldsmith, who was to be cut piecemeal with razors.—8 *W. Jones*, 50. Other offences were punished by drinking boiling hot liquids, or by burning, or by extending the prisoner on an iron bed red hot. By the laws of Iyeyas, in Japan, spearing, or decapitation, or burning alive were the usual modes of capital punishment. But before 1600, prisoners were sometimes boiled in hot water. In Japan it is also related the limbs of the criminal were sometimes tied to the tails of four oxen, which were suddenly started by fire to tear the body asunder.—*Dickson's Japan*, 247. In Siam, for lying, the mouth was sewed up, and for embezzlement and extortion, swallowing melted silver.—3 *Univ. Mod. Hist.* 346. And for murder and rebellion, ripping up the body or trampling by elephants. In parts of India straw was twisted round the offender's limbs; and covering him with chaff, he was set on fire.—*Wilson's Gloss.* (*Tusha.*) In Tunis the criminal's clothes were dipped in pitch and set fire to.—7 *Univ. Mod. Hist.* 317. In ancient Abyssinia the criminal was buried in the earth up to his head, on which were piled thorns and briers, and then a large stone.—6 *Univ. Mod. Hist.* 215. In Germany a malefactor was suspended in chains between two mastiffs, which were said to be hung by the heels, so that when starved they might devour him.—*Morryson's Germ. P.* iii. p. 204. In the Canary Islands the criminal lay down with his head on a stone, and the executioner dashed another heavy stone upon it.—16 *Pink. Voy.* 820. In Central Africa the victim was led out and then speared.—*Livingst. S. Afr.* 182. The Western Moors sawed the body of a thief asunder, or tossed him up, so that he might fall on his head.—15 *Pink. Voy.* 678, 755. In Korea they trampled on the criminal, then poured vinegar down his throat, till his body was distended, and then beat it with cudgels. —7 *Pink. Voy.* 539. In the West India Islands it was said that a rebellious slave was often suspended by a hook inserted under his shoulder. Exposed to a scorching sun, his flesh blistered, and, attracting the flies by day, and exposed to chilling

Twelve Tables punished with death, not only the perjurer, but the man who came privately by night, and trode down another man's field of corn, or who reaped his harvest, or who maliciously set fire to another's house, or to a heap of corn near it. Among the Romans one capital punishment was that of throwing the criminal into a pit or well with hurdles over him.[1] And crucifixion was a memorable practice, the criminal being first scourged, stripped, and nailed to the tree, and left to die of hunger.[2] Caligula commanded his executioners not to kill the victims at once, but by gentle and repeated strokes, so that they might feel the lingering tortures of dissolution.[3] And the Venetians invented a large wooden cage in which to suspend a criminal, and feed him with a gradually decreasing quantity of bread and water, till he died of cold, hunger, and misery.[4] A statute of 22 Henry VIII., as already stated, inflicted the punishment of boiling to death for wilful poisoning.[5] And burning alive was also practised in England, as will be stated immediately. Coke says that Henry I. ordained by his parliament that a person attainted of felony should always be hanged by the neck, and that mode of punishment has held its ground to this day.[6]

But other varieties may also be noticed with advantage, for one or two conspicuous crimes, such as adultery, witchcraft, heresy, and treason.

Sentence of death for adultery.—Adultery is an offence which in nearly all barbarous and all Oriental countries has been punished with the most elaborate malignity, and often with death. By the laws of Menu the adulterous wife was devoured by dogs in a public place, and the adulterer burned slowly to death on a red-hot iron bed.[7] By the Gentoo code the adulterer was mutilated and led naked through the streets and mounted on an ass.[8] In ancient Greece he was torn to pieces.[9] And in the ancient laws of

dews by night, till hunger and thirst threw him into a raging fever, which ended his torments only after a few days.—1 *Benth. W.* 443.

[1] Liv. b. i. c. 51; Tacit. Germ. 12. [2] Livy, b. xxxiii. c. 36; Val. Max. b. i. c. 7. [3] Suet. Calig. [4] 4 Hazlitt's Ven. 306. [5] See *ante*, vol. i. p. 372. [6] 3 Inst. 53. [7] 7 W. Jones, 390; 7 Maurice, Ind. Ant. 330. [8] Ibid. [9] Suid. Hippom.

England the nose and ears were cut off.[1] And in ancient Egypt the offending woman's nose was cut off and the man had 1,000 lashes.[2] In Barbary she was buried in a pit up to her waist and everybody present threw a stone at her.[3] In some other countries she was merely turned out of her husband's house with a mean dress and a needle, by which to get her living.[4] By the law of Moses in case of adultery, both the parties committing it were stoned to death.[5] But this punishment was confined to the case of a freewoman, for in the case of a bondwoman it was only a matter of stripes and a fine or trespass offering.[6] Macrinus caused adulterers to be bound together and burnt alive.[7] A Vestal virgin who violated chastity was condemned to be buried alive in a deep vault with a little food sufficient to last a few days only. The Incas had no difficulty in assigning the penalty of death to adulterers, homicides, and thieves.[8] In Korea, the adulterer was stripped, had an arrow fixed in each ear, and a drum tied to his back, which they beat at all the cross streets, to expose him.[9]

Capital punishment for witchcraft.—The crime of witchcraft is one which had in all ages been usually punished capitally. The Salique law merely fined for witchcraft. The laws of Constantine punished with fire and torments. The Ostrogoths inflicted death. The Wisigoths beat with stripes, shaved the head, and exposed the offenders. The Lombard law ordered the offenders to be sold as slaves. The Anglo-Saxons banished the offenders, with a penalty of death for disobedience.[10] But if the witch had eaten a man, then she was executed.[11] The primitive law of Scotland condemned the witch to the stake. The laws of the Franks imposed drowning. The laws of Hungary ordered fasting and the catechism for the first offence: branding on the forehead for the second.[12] In the reign of

[1] Anct. Laws of Eng. 174. [2] 2 Wilk. Anct. Egypt, c. 8. [3] 15 Pink. Voy. 426. [4] 15 Ibid. 27. [5] Lev. xx. 10; Deut. xxii. 22. [6] Lev. xix. 20-22. [7] Capit. Macr. [8] Com. of the Incas, b. i. c. 21. [9] 7 Pink. Voy. 539. [10] Laws of Ed. & Guth. tit. xi.; Ethelred. tit. vi.; Cnut, Sec. c. 14. [11] Æthelst. tit. i.; Hen. I. tit. lxxi.

[12] Lea, Superstition, 223. The Kaffirs in punishing witchcraft, the most serious of their crimes, lay their victim on his back, throw

Henry IV., sorcerers and witches began to be eagerly searched for, tried, and burnt; and one of them, a duchess, had a narrow escape in the reign of Henry VI., and escaped only with imprisonment for life.[1]

The belief in the middle ages, that sorcerers and witches devoured men, and that they were, like their master Satan, incapable of sinking in water, thereby making the water ordeal inapplicable, gave rise to an ordeal of trial by balance, which consisted in weighing the accused; and, if unnaturally light, the party was deemed guilty. Many fat women were declared by the advocates of this trial to weigh only thirteen or fifteen pounds. And in some places the accused was put in one scale and a Bible in the other.[2] When a superstitious panic against witchcraft revived near the end of the sixteenth century, the water ordeal was retained for trial of such cases, after it had been abandoned in all others. The imponderable quality of the witch was assumed to be an infallible test of guilt; and learned writers proved by citations from Scriptures and the Fathers, how the water ordeal was the only satisfactory process to cope with the diabolical artifices of sorcery.[3] In England James I. laid down the same doctrine.[4]

Witchcraft, or something resembling it, is or was a common law offence in all stages of civilisation, and is one of the oldest crimes known among men. The statutes which gave the dignity of their authority in England to prosecutions for witchcraft, conjuration, enchantment, or sorcery, as well as provoking to unlawful love, began in the reign of Henry VIII., and received additions and qualifications in the reign of Edward VI., Mary, Elizabeth, and James I.[5] Whitelocke said, that twenty witches in Norfolk were executed about 1645.[6] One of the last capital convictions

water on his body. Ants' nests are then beaten to pieces over him, which so enrages the ants that they creep into his nose, and ears, and mouth, producing excruciating agony.—*Maclean's Kaffirs*, 90.

[1] 10 Rymer, Fœd. 505, 851. [2] Konigswater, p. 186: Rickius, Defensio Probæ Aq. Frigid. § 41; Collin de Plancy, s. v. Bibliomancie.; Lea on Superstition. [3] Rickius, Defensio Aq. Frigid. [4] Demonol. lib. iii. c. 6. [5] 33 Hen. VIII.; 5 Eliz. c. 6; 1 Jas. I. c. 12.

[6] 4 St. Tr. 818. The belief, as well as the appropriate remedy, were part of the simple faith of all classes, from the monarch and

for the crime of bewitching was said to have taken place two centuries ago. In such trials before Hale, C. J., at Bury, in 1665, it was proved, after the fashion of proof then current, that two wrinkled old widows assumed shapes of a mouse and bee, and tormented two children, and made another child harbour toads in mysterious ways: experiments were allowed at the trial by making the two witches touch the bewitched persons, whereupon these would suddenly shriek and open their hands, which were before clenched. The prisoners were convicted to the entire satisfaction of the judge. And the next morning the three bewitched children went to Sir M. Hale's lodging, and were in as good health as before; while the witches were executed on the fourth day.[1] The cases before Hale, C. J., were however not the last. In 1716 Mrs. Hicks and a daughter, aged nine, were hanged at Huntingdon for selling their souls to the devil, destroying their neighbours by making them

the bishop, to the peasant. Bishop Jewel, in a sermon before Queen Elizabeth, said: "Witches and sorcerers had marvellously increased within the last few years. Your Grace's subjects pine away even unto the death, their colour fadeth, their flesh rotteth, their speech is benumbed, their senses are bereft. The shoal of these malefactors is great; their doing horrible: their malice intolerable: the examples most miserable." King James felt himself aggrieved by witches detaining him with contrary winds when he went to Denmark in quest of his queen. Bacon, without comment, related as part of the natural history of the time, that "the ointment which witches use is reported to be made of the fat of children digged out of their graves." And Dalton, in his *Justice*, in noticing the evidence on prosecution for witchcraft, lays down the law, that "the devil's mark is like a flea-bite; imps may be kept in pots or other vessels; and the pots and places in which they are kept stink detestably, and therefore such stinking places in a house are signs that imps are kept."

[1] Witches' Case, 6 St. Tr. 647. A later judge, FOSTER, commenting on Hale's judicial conduct, said, "this great and good man was betrayed, notwithstanding the rectitude of his intentions, into a lamentable mistake, under the strong bias of early prejudice."—*Foster, Rep. Pref.* 7. And LORD CAMPBELL says, still later, that Hale was "really the murderer of two innocent women."—1 *Campbell, C. J.*, p. 562. Holt, C. J., is said, in 1702, to have practically discouraged trials for witchcraft by directing prosecutions against the parties who pretended to be bewitched, and punishing them as cheats and impostors, and asking the jury if each of them was *non compos mentis.*—*Hathaway's Case*, 14 *St. Tr.* 630; 2 *Campbell, C. J.*, p. 171.

vomit pins, and raising a storm that nearly caused a ship to be lost.[1]

The statute of witchcraft was not repealed till 1736, and it was expressly enacted, that no more prosecutions for witchcraft, sorcery, inchantment, or conjuration were to be allowed; but an offence of pretending to exercise witchcraft and tell fortunes was made punishable with one year's imprisonment.[2] The same statute deprived the Scottish nation of the old privileges of witchcraft prosecutions. And in 1743, a Scotch Presbytery issued a manifesto bewailing this repeal as contrary to the express law of God.[3]

Capital punishment by burning for heresy, &c.—The Romans believed, that the earliest British mode of treating criminals was by burning them in a large cage of wicker-work.[4] They themselves burnt alive those guilty of sacrilege.[5] The Babylonians burned in a furnace.[6] At Algiers, for blaspheming Mahomet, the offender was roasted alive.[7] This mode of punishment had soon become, for some reason best known at the time, the most suitable for heresy. It is said that St. Augustine originated the doctrine, afterwards accepted and acted on by most countries, that errors in religion, if adhered to, were punishable with civil penalties and corporal tortures.[8] In the laws of King Alfred, King Athelstan, King Cnut, and Henry I., burning alive as well as drowning and stoning and throwing over precipices were common punishments.[9] And burying alive was one punishment in the time of the *Mirror*.[10] By a statute of Henry IV. any bishop could convict of heresy, and issue his precept to the sheriff to burn the offender. But the statute of Henry VIII. repealed that authority, and made it necessary for the bishop to first get the king's writ *de heretico comburendo*. Coke says, that from the time of Bracton a heretic was burnt to death.[11] And in 1535 some Anabaptists were burned in Smithfield, hung in chains in presence of the king, nobles, and bishops.[12] And two Anabaptists were burned in 17 Elizabeth.[13] The

[1] 4 St. Tr. 827. [2] 9 Geo. II. c. 5. [3] 4 St. Tr. 829. [4] Cæsar, b. vi. c. 16; Tac. An. b. xiv. c. 30; Plin. Hist. xxx. 4. [5] Dig. 48, 13, 6. [6] Dan. i. [7] 7 Univ. Mod. Hist. 216. [8] Mosh. 4th Cent. p. 2, c. 2. [9] Anct. Laws of England. [10] Mirror, c. 4, c. 14. [11] 3 Inst. 43. [12] 2 Pike on Crime, 53. [13] 15 Rymer, 740.

writ for burning a heretic is said to have been first made conspicuous in the reign of Henry IV., when William Sautre was burned with fire.[1] The Lollards were ordered by statute to be burned on a high place before the people, that such punishment might strike fear.[2] And a statute of Henry VIII. directed the same punishment on heretics to be inflicted in open places.[3] Coke, Bacon, and Hale seem to hold, that at common law this writ was issuable, though in practice it issued only by a special warrant of the crown.[4] Yet Coke says, witches were burnt to death before the Conquest, according to common law.[5] At least Henry IV. was advised, that the writ must first issue before the sentence could be executed.[6] John Bradley was burned in a barrel at Smithfield in 1413 for heresy, on denying that the bread was Christ's body.[7] And the same year Lord Cobham was hung up in chains of iron, and burned alive in St. Giles's Fields for heresy and treason.[8] In Queen Mary's reign the number who suffered martyrdom by fire has been variously estimated from 284 to 800. Lord Burleigh estimated it at 290, and Hallam inclined to the lower computation. James I. was the last sovereign who practically put in force, and that on two occasions, the writ *de heretico comburendo.*

It must not be forgotten, that the capital punishment of women for treason and felony was by burning, and had been so from the time of Edward III., nay, even from the time of the Druids.[9] The case of Mrs. Gaunt, burnt for harbouring traitors, swelled the public indignation against the Stuarts. It is true, noble women used, as a favour, to be allowed to be beheaded instead of burnt; and this favour was reluctantly allowed to Alice Lisle by James II.[10] In 1721 a woman was burnt alive for coining;[11] and in 1726 Catherine Hayes, for murdering her husband, was disposed of in the same way.[12] Perhaps the last instance of burning a female offender was that of Mary Quin at Portsmouth, in 1784 for murder.[13] This sentence of burning women

[1] 3 Rot. Parl. (2 Hen. IV.) 459. [2] 2 Hen. IV. c. 15. [3] 25 Hen. VIII. c. 14; 31 Hen. VIII. [4] 3 Inst. 39; 1 Hale, 383; Bacon, Prepar. for Union of Laws. [5] 3 Inst. 44. [6] Barringt. Stat. 353. [7] 1 St. Tr. 221. [8] Ibid. 254. [9] 25 Ed. III. c. 85; 1 Hale, 382; 2 Hale, 397; 3 Inst. 311. [10] 2 Pike on Crime, 214. [11] Ibid. 288. [12] Foster, Cr. L. 336. [13] 2 Pike on Crime, 379.

for petty treason, as well as treason, was abolished in 1790; and the punishment was made from that time the same as that prescribed for men.[1]

Capital punishments for treason.—By the code of China the punishment of high treason in subverting the government or the established worship was cutting the victim into a thousand pieces, and so prolonging his torture; the executioner inventing the most refined methods of pain almost at discretion.[2] Not only was the convicted person so dealt with, but all his male relations, in the first degree above the age of sixteen, were indiscriminately beheaded, and also more distant relatives, if living under the same roof; and the younger children were sold as slaves. And noble Persians were liable to be beheaded, starved to death, suffocated with ashes, to have their tongues torn out, to be burned alive, to be shot, to be flayed, and then crucified, to be buried alive all but the head, to be poisoned, to be hung between two boats in a long agony.[3] When Henry IV. was murdered by Ravaillac, the council deliberated what would be an adequate punishment. A butcher suggested a mode of flaying him alive, but so that he should be kept in that state three days. This proposal was thought rather too barbarous; and it was resolved to break him on the wheel, and keep him two days on the rack.[4]

In our own country, at an early period the judgment of high treason consisted of six stages. 1. Dragging the criminal at a horse's tail along the streets from the prison to the place of execution. 2. Hanging him by the neck, yet so as not entirely to destroy life. 3. Plucking out and burning his entrails while he was yet alive, and before his face. 4. Beheading him. 5. Quartering him. 6. Exposure of his head and quarters in conspicuous situations.[5] After sentence the prisoner was kept chained down on the floor till the time of execution.[6] The sentence at a later date required the traitor to be drawn on a hurdle; and this was usually without a hat or neckcloth, and while chained to a seat. But this drawing used at first to be, as Foster once described it, "without the poor comfort

[1] 30 Geo. III. c. 48. [2] Staunton, Code, 269. [3] 4 Rawl. Anct. Mon. 206. [4] 22 Parl. Deb. 381. [5] 3 Inst. 210. [6] 18 St. Tr. 377.

of a hurdle;" though latterly the hurdle was introduced into all sentences for treason.[1] That part of the sentence for this crime, which consisted in burning the bowels before the face of the dying man, was scrupulously adhered to. In 1746 Colonel Towneley, who had been convicted of high treason, was executed as follows:—After he had hung six minutes, he was cut down, and having life in him as he lay upon the block to be quartered, the executioner gave him several blows on his breast, which not having the effect designed, he immediately cut his throat; after which he took his head off, then ripped him open and took out his bowels and heart, and threw them into a fire, which consumed them. Then he slashed his four quarters and put them with the head into a coffin, and they were carried to the new gaol in Southwark, where they were deposited till August 2 (three days later), when his head was put on Temple Bar, and his body and limbs suffered to be buried.[2] It was said, that Harrison, one of the regicides, after being hanged and cut down alive, and his body opened for disembowelling, gave the executioner a box on the ear; and he lived to see his bowels burnt.[3] When Romilly had so much difficulty in urging the legislature to discontinue that savage part of a traitor's doom, the disembowelling of the victim, the practice was traced to the time of Edward I.[4] The legislature at last yielded to the arguments of the law reformers, near the beginning of this century, and in 1814, a statute passed and altered the worst part of it. Thereafter the sentence was ordered to be, that the person should be drawn on a hurdle to the place of execution, and be there hanged by the neck until he should be dead, and that afterwards the head should be severed from the body of such person, and the body, divided into four quarters, should be disposed of as his majesty should think fit. But a special power was reserved to the crown after sentence to dispense with drawing the body on a hurdle, by ordering the body to be taken to the place of execution. There was also a reserved power to order the head to be severed from the body while alive, and to direct how the body, head, and quarters were to be disposed of.[5] It was not till fifty-six years later, that the legislature

[1] Fost. Cr. L. 336. [2] R. v Towneley, 18 St. Tr. 329. [3] 5 St. Tr. 1237. See vol. i. p. 367. [4] 24 Parl. Deb. 566. [5] 54 Geo. III. c. 146.

made the next retreat from its untenable position; for in 1870 those parts of the sentence, which included the drawing on a hurdle, the severing of the head, and the dividing of the body into four quarters, were entirely repealed.[1]

Interval between sentence and capital execution.—Humanity seems in all cases of capital punishment to expect some interval between sentence and execution. In Athens an interval of thirty days was allowed, and Socrates had the benefit of that period before drinking the fatal cup. The Roman senate in the time of Tiberius decreed, that no criminal should be executed till ten days after sentence, a period extended by Theodosius the Great to thirty days. This law was said, indeed, to have been transgressed by Pontius Pilate in ordering our Saviour to immediate crucifixion; but Gothofredus said, that neither the law of Tiberius nor Theodosius extended to the Roman provinces till a much later period.[2] No definite period seems to have been prescribed in our law till, in 1752, it was directed by statute, that, as a further terror to the punishment of death, the convicted person should be executed on the second day after sentence, unless it happened on a Sunday, and then the execution was to be on Monday.[3] And the prisoner was to be kept apart from other prisoners, and fed with bread and water only in the interval.[4] But in 1828 power was given to the judge or court to extend the time for execution.[5]

Present extent of capital punishment, and how carried out.—It was during the present century that the legislature at last yielded to the voice of public opinion and of the growing civilisation of mankind by withdrawing capital punishment from many offences one by one, and none are now left except two only, those of murder and treason.[6] When there is a verdict of murder, the court or judge is bound to pronounce sentence of death, leaving it to the mercy of the crown whether or not that sentence shall be carried into execution.[7] And having cast aside

[1] 33 & 24 Vic. c. 23, § 31. [2] Goth. Cod. Theod. tom. iii. p. 307. [3] 25 Geo. II. c. 37, § 1. [4] Ibid. §§ 6, 8. [5] 9 Geo. IV. c. 31, § 4. See as to treatment in prison during this interval, *ante*, p. 264. [6] 24 & 25 Vic. c. 100, § 1; 33 & 34 Vic. c. 23, § 31. [7] 24 & 25 Vic. c. 100, § 2.

all the other accompanying barbarities, the body of the convicted murderer is to be buried within the precincts of the prison, in which he shall have been last confined, or some other fit place.[1]

In most countries publicity was aimed at in the most severe sentences; and hence executions were carried out during the day time. The Lacedemonians, however, executed their criminals by night and not by day.[2] When a prisoner is now sentenced to death in this country, he is kept in a cell apart, and watched night and day; while his food is regulated by the visiting justices and the gaoler.[3] In this country, as in the rest of the world, it was long deemed essential to the effectiveness of the punishment of death, that it should take place in full view of the people; but even that barbarism was relinquished in 1868. The judgment is carried out by hanging within the walls of the prison in presence of the sheriff and officers of the gaol, and such relatives and persons as the sheriff may deem proper to admit. A coroner's inquest is held, and their inquisition certifies the fact of due execution, and completes the whole formality, while the body is buried as already stated.[4]

Posthumous punishments of the body.—Not only did the law inflict cruel punishment on the living body, but, after all was over its vengeance pursued even the inanimate clay with further barbarities. Even the law of Moses, besides the sword and stoning, prescribed certain posthumous punishments, such as burning the dead body:[5] hanging up the dead body on a tree or a gibbet:[6] or piling stones upon it as it lay on the ground:[7] this last being among the Arabians a peculiar mark of ignominy.[8] The ancient Persians and Scythians used to flay the corpses, but not the living bodies of criminals.[9] Tacitus says, that at the foot of the Capitoline Hill the dead bodies of malefactors were exposed and dragged by a hook and thrown into the Tiber.[10] The Roman law accordingly let the dead bodies remain on the gibbet after execution.

[1] 24 & 25 Vic. c. 100, § 3; 31 & 32 Vic. c. 24. [2] Herod. b. iv. [3] 28 & 29 Vic. c. 126, sched.; see *ante*, p. 264. [4] 31 & 32 Vic. c. 23. [5] Josh. vii. 15, 25; Lev. xx. 14; xxi. 9; Gen. xxxviii. 14. [6] Deut. xxi. 22; Josh. x. 16; Gen. xl. 19. [7] Josh. vii. 25, 26; viii. 29. [8] Michaelis, Com. § 235. [9] Herod. b. iv. 64; b. v. 25. [10] Ann. b. iii. c. 15.

Hale indeed says, that punishment is more for example than for pain; but in case of murder there seemed to be a justice of retaliation, if not *ex lege naturali*, yet at least by a general divine law given to all mankind.[1] Yet the notion was, that the court had no power to order the dead body to be hung in chains, and that the king alone could give such an order. Hence during the king's absence at Hanover, in 1741, on the petition of the relatives of the murdered man, the regency ordered that the body of the murderer should be allowed to be hung in chains; and it was hung accordingly at Shepherd's Bush.[2] In 1749, the court ordered the bodies of five men convicted of murder to be hung in chains at a place called Brayle, near Chichester.[3] Afterwards, in 1752, express power was given to the convicting judge to direct this. Moreover, in order, as was said, to add further terror and a peculiar mark of infamy to murder, it was expressly enacted, that the murderer should after execution be delivered to the sheriff, then delivered by him to the company of surgeons or some surgeon named, to be dissected and anatomised.[4] And the judges met soon afterwards and agreed, that this order for dissection should be mentioned in the sentence. They were doubtful, however, whether they could order the body to be first hung in chains and then dissected; but the majority thought nothing should be said in the sentence about the chains, and that it should only mention dissection; and that the hanging in chains might afterwards be added by a special order to the sheriff.[5] In 1829, the court was required to direct, whether the body was to be dissected or hung in chains, one or other.[6] At last, in 1834, that part of the sentence, directing the dead body to be hung in chains was repealed altogether; and no such practice is now tolerated in any case whatever.[7]

Dissecting dead bodies of criminals.—The other terror to enhance the punishment of death was the dissection of

[1] Gen. ix. 6. HOLT, C. J., seems to have said (what could only have been a somewhat grim jest), that "if a man be hung in chains on my land, after the body is consumed, I shall have the gibbet and chain."—Spink *v* Spicer, 1 L. Raym. 738.

[2] 18 St. Tr. 1201. [3] R. *v* Jackson, 18 St. Tr. 1114. [4] 25 Geo. II. c. 37, §§ 1, 2. [5] 25 Geo. II. c. 37; 1 East, P. C. 374. [6] 9 Geo. IV. c. 31; 2 & 3 Will. IV. c. 75. [7] 4 & 5 Will. IV. c. 26.

the body after death. In the time of Henry VIII. the companies of barbers and surgeons were allowed to dissect the dead bodies of those condemned at Tyburn, which is said to have been the earliest instance to be noticed in any country of an encouragement of anatomy.[1] And this practice was again recognised by several statutes as a befitting addition to the terror of the punishment for murder.[2] Lord Loughborough told the peers, that the part of a felon's sentence, that his body would be dissected and deprived of sepulture, had a most wholesome effect on the criminal mind.[3] But however wholesome it may have been once thought, we have in modern times arrived at the clear conclusion, that it is altogether unwholesome; and, therefore, that part of a murderer's sentence was wholly repealed in 1834.[4]

If living bodies of criminals are fit subjects for experiments.—This practice of dissecting bodies of dead convicts was once thought capable of being extended to the living bodies, as subjects for vivisection or experiment. It is said Maupertuis suggested that criminals, whose lives were forfeited, should be subjected to medical experiments for the benefit of science.[5] Probably that notion once haunted the minds of legislators in England. It seems once, at least, to have occurred to the government of this country, that it might be useful to try experiments on the bodies of condemned criminals, and reserve them for that purpose, so as to extort some value to their kind, and a return for all the trouble they had caused to their fellow creatures—a return they were unwilling and unlikely to offer voluntarily. In 1721 the crown asked the opinion of the law officers, whether the lives of such men might not be spared, on condition of their submitting to experiments for inoculation with smallpox. Raymond, C. J., and Hardwicke, L. C., then law officers, went the length of advising his majesty, that as the lives were in his power, he could grant a pardon to them on any lawful condition; and they thought this was a lawful condition.[6] Yet this opinion was without any apparent authority, and revolting to common sense. At no period even of the most slavish

[1] 31 Hen. VIII.; Barringt. Stat. 475. [2] 25 Geo. II. c. 37; 9 Geo. IV. c. 31, § 5. [3] 26 Parl. Hist. 196. [4] 4 & 5 Will. IV. c. 26. [5] Barringt. Stat. 447. [6] 1 Hardw. Life by Harris, 117.

ascendency of the feudal law, was it ever assumed or contended, that the bodies of men, dead or alive, criminal or non-criminal, belonged to the king, and Coke expressly lays this down.[1] If the champions of liberty had a century before cleared the air by vindicating the doctrine, that the king could not by word or writing imprison any man's body even for an hour, how much less could the king order him to be kept for the purpose of subserving the experiments of surgeons, or torturing that body in the minutest degree? If the time shall ever come when the bodies of convicts may be utilised for science in this way, it will require a legislator in parliament first to propose and then to carry such a law; and it will be time enough to consider it, when it shall be submitted as a practical proposition.

Benefit of clergy as an escape from capital punishment.—Now that we have seen, how all ages and countries have been making free with the lives of criminals, how indiscriminate has been the destruction of life dealt out on all hands, and often for the most petty objects, and not only destruction, but the most excruciating agonies accompanying the process of destruction, we come now upon the last view of the question, whether all this profuse waste of life was necessary—whether it was essential to the existence and well-being of any community, that the life of any member should be forfeited and destroyed, without even a thought as to its meaning and destiny. That the ancients had any glimpses of a suspicion, that they were committed to practices inhuman and unnecessarily cruel; that it ever occurred to them that they might possibly be going to an excess in destroying life, and that it would be well to try and escape from some of it, may be too much to assert; but since the Christian era such a suspicion must have grown up and visited many minds. Unless this were so, one cannot explain the general acceptance and popularity of the practice of benefit of clergy, which began indeed and long continued as a kind of claim of the clergy to manage their own affairs, but was also soon extended into a boon for the relief of society in general from the tyranny and cruelty of death punishments. Benefit of clergy, as Hallam observed, was no more than

[1] 3 Inst. 214.

the remission of capital punishment for the first conviction of felony, and that not for the clergy alone, but for all culprits alike. They were not called on at any time to prove their claim as clergy, except by reading the neck verse after trial and conviction in the king's court.[1]

Origin of benefit of clergy.—Soon after the Christian era it came to be an accepted maxim, that the disputes between ecclesiastics should be settled by the bishops. But as to the priests being exempted from the ordinary jurisdiction of the courts in case of suits between laymen and ecclesiastics, or criminal charges against clerks, such a claim was advanced, though not easily conceded, except to a small extent. Justinian seemed to grant the privilege, but coupled it with an appeal to lay tribunals.[2] With the Burgundians and Visigoths the clergy were not exempt from punishment by the lay tribunals for aggravated offences.[3] But the persistence of the Church, supported by the powerful remedy of excommunication, triumphed sooner or later; and in all the laws of all the countries of Europe it stood admitted, that the priesthood had an immunity from the process of secular courts.[4] Similar struggles were going on in all European countries, between the spiritual and secular powers. In 1220 Frederick II. decreed, that no one under pain of forfeiture of his claim should drag a clerk before the secular tribunals, either in civil or criminal proceedings; that the judgment would be null, and the judge be deprived of his office.[5] In 1491 a Synod of Bamberg threatened with excommunication and deprivation any clerk who obeyed a summons from the secular courts in either civil or criminal cases.[6]

[1] 2 Hallam, Mid. Ag. 225. The ancients seem to have been visited with some slight compunctions as to the length to which the law went in capital punishments; for we are told that exposure to wild beasts was thought by the Romans to be in excess of the law.—*Suet. Claud.*

[2] Novell. 83; Nov. 123, cc. 20, 21. [3] Concil. Toletan. iii. A.D. 675, can. 5. [4] Bracton, 3, 2, 9; Ancient Laws of Wales, i. 475-9; Assises de Jerus. Baisse Court, c. 14. [5] Constit. Frederic, ii. § 7.

[6] Ludewig, Scrip. Rer. Germ. i. 1206. In Spain, in the thirteenth century, a council ordered ecclesiastics, guilty of certain capital crimes, to be degraded by the bishop.—*Martene et Durand. Thesaur.* iv. 171. And a Portuguese bishop, in 1335, asserted that no ecclesiastic, however mean, could be subjected in any case to any secular power.—*Alvari Pelagii,* lib. i. art. 37, No. 5. In France

In England the exemption of the clergy from civil courts had been established in the Anglo-Saxon legislation.[1] When Henry II., in the Constitutions of Clarendon, sought to attack the benefit of clergy, Thomas à Becket baffled his attempts by excommunication, and the scheme was abandoned. Yet the civil courts were constantly violating this priestly privilege, which caused frequent complaints.[2] Edward I. ordered all clerks accused of felony to be fairly tried by the ecclesiastical courts; otherwise he would have to interfere.[3] But the evil was inveterate, and it is hinted, that in the next reign, after purgation in the ecclesiastical court, the clerk was easily acquitted.[4] In the reign of Edward III. when a clerk was accused of a crime, he was sometimes tried in the first instance before a jury; but, whether or not, and though tried and found guilty, he was delivered over to the bishop, where he could claim trial by compurgation. In other words, if he found a few persons who would make oath of his innocence, and who would swear that they believed he swore the truth, and this result could be procured easily by payment of money, then he was, as a matter of course, acquitted. And not only was he cleared of the particular crime charged, but also was by statute expressely purged of all crimes antecedently committed.[5] The statute of Henry VII. in 1487, at last introduced a new idea. It recited, that, upon trust of the privilege of the Church, divers persons had been the more bold to commit murder, rape, robbery, theft, and all other mischievous deeds, because they had been continually admitted to the benefit of clergy as oft as they did offend

Philip the Fair, in 1291, was obliged to admit that even letters under the royal seal could not compel an ecclesiastic to appear in a secular court.—*Isambert, Anc. Lois Fr.* i. 686. And in 1328 Philip of Valois complained, that murderers and malefactors of all kinds were released from the secular courts on merely asserting their clergy.—*Bib. Mag. Patrum*, t. xiv.

[1] Laws of Cnut, Eccl. c. 4; Secul. c. 41-3.

[2] Concil. Lambeth, A.D. 1261 (Harduin vii. 539.) In Wales it was conceded in the seventh century that an ecclesiastic should only be sued in the bishop's court.—*Canon. Wall.*, c. 40-45; *Haddan & Stubbs, Councils of G. Britain*, i. 133; *Owen's Anc. Laws of Wales.* In Scotland it appears that so late as A.D. 1400 the secular tribunals had jurisdiction over the clergy.—*Stat. Rob.* iii. c. 5, *Ap. Skene.*

[3] 3 Ed. I. c. 2. [4] Mirror, c. 3, Sect. 4. [5] 25 Ed. III. st. 6, c. 4.

in any of the premises. Accordingly, in avoiding of such presumptuous boldness, it was enacted, that all persons convicted of murder, and praying clergy, should be branded on the thumb with the letter M, and those convicted of other felonies with the letter T; and those marks were to be made by the gaoler openly in court in presence of the judge, before such persons should be delivered to the ordinary. And on a second conviction none should be delivered to the ordinary having such marks on them, except they produced their letters or certificate showing that they were really clerks.[1] This was not, as will thus be seen, required of the clergy, whose only punishment was degradation, if found guilty, And degradation was impracticable, owing to the number of bishops who required to meet and join in it, and which Wolsey admitted to be a defect, and sought to check, by getting a papal bull to authorise one bishop and two abbots to pronounce a sentence.[2]

At the time of the Reformation the evil had become intolerable, and Luther, in his controversy with Ambrogio Caterino, vigorously denounced the universal chaos of crime, which arose from the law exempting the clergy, and all belonging to them, from secular accusation, trial, and punishment. The Diet of Nürnberg in 1522, also authoritatively represented to Adrian VI. that benefit of clergy was the direct source of countless cases of adultery, robbery, coining, homicide, arson, and perjury committed by ecclesiastics; and that, unless the clergy were relegated to secular jurisdiction, there was reason to fear an uprising of the people, for no justice was to be had in the spiritual courts against a clerical offender.[3] Indeed early in the sixteenth century a French jurist laid down the law to be, that a clerk is exempt from secular courts both before and after conviction, subject to a few exceptions.[4] Henry VIII. succeeded in making some of the higher crimes punishable without benefit of clergy, and by depriving those not clerks of that defence.[5] And this setting in of a practice of wholly abolishing the benefit of clergy gradually led to first one and then another crime being

[1] 4 Hen. VII. c. 13. [2] Rymer, Fœd. xiv. 239. [3] Le Plat, Monum. Conc. Trident. ii. 178. [4] Chassenæi Op. pp. 182, 206. [5] 23 Hen. VIII. c. 1; 25 Hen. VIII. c. 3; 28 Hen. VIII. c. 1; 32 Hen. VIII. c. 3.

treated impartially, whether committed by one class or another. And though in Mary's reign the statutes of Henry VIII. were repealed,[1] they were to some extent re-enacted in Queen Elizabeth's reign, when a law was passed to use the brand in all cases where the benefit of clergy was allowed, so that on a second offence it should not again take effect.[2] And this last statute allowed the clerk, after showing his qualification, to be delivered at once without even being sent to the ordinary, though the justices were allowed to keep him in prison a year before his discharge. Indeed Hobart says, that the mock trials before the bishop of a convicted person, who had pleaded his clergy, were disgraceful for their perjuries.[3] A little later, convicted thieves were to be burnt in the left cheek instead of the hand, and nearest the nose; and this was still to be done in open court in presence of the judge, whose duty it was to see justice strictly and effectually executed.[4] But as this was found to prevent the persons so marked from gaining a living, the branding was confined soon after to the hand, and an imprisonment of six months to two years was ordered; while reading from the book, being an unmeaning form of no use, was altogether dispensed with.[5]

Benefit of clergy said to arise from scarcity of priests.—Though the usual account of benefit of clergy attributes its origin to mere covetousness of priestly power, others say it began in the scarcity of finding candidates for the sacred office. In Bacon's *Use of the Law*, published in 1630, the following lucid account is given of the practice of benefit of clergy:—"Because some prisoners that can read have their books, and be burned in the hand, and so delivered, it is necessary to shew the reason thereof. This having their books is called their clergy, which in ancient times began thus. For the scarcity of men that could read, and the multitude requisite in the clergy of the realm to be disposed into religious houses, priests, deacons, and clerks of parishes, there was a prerogative allowed to the clergy, that if any man, that could read as a clerk, were to be condemned to death, the bishop of the diocese might, if he would, claim him as a clerk: and he was then

[1] 1 Mary, Sess. 1, c. 1, § 5. [2] 18 Eliz. c. 7. [3] Hob. 291.
[4] 10 Will. III. c. 12, § 6. [5] 6 Anne, c. 9.

to see him tried in the face of the court, whether he could read or not. The book was prepared and brought by the bishop, and the judge was to turn to some place as he should think meet; and if the prisoner could read, then the bishop was to have him delivered unto him to dispose in some place of the clergy as he should think meet: but if either the bishop would not demand him, or that the prisoner could not read, then he was to be put to death. And this clergy was allowable in the ancient times and law, for all offences except treason and robbing churches of their goods and ornaments. But, by many statutes made since, the clergy is taken away for murder, burglary, purse-cutting, horse-stealing, and divers other felonies particularised by the statutes to the judges; and lastly, by a statute, made 18 Elizabeth, the judges themselves are appointed to allow the clergy to such as can read, being no offenders from whom clergy is taken away by any statute, and to see them burned in the hand, and so discharge them without delivering them to the bishop: howbeit the bishop appointeth the deputy to attend the judges with a book to try whether they can read or not."[1]

Benefit of clergy did not prevent some disabilities at common law.—Though the benefit of clergy thus took its rise from the common law, and gave the privilege only to men in holy orders, yet soon the law extended the same favour to lay clerks, *i.e.* any man that by reason of his ability to read, was qualified to be made a priest. While the common law insisted on trying the clergy before secular judges, a person entitled to clergy was remitted to the ordinary, to be kept in the ordinary's prison till he purged himself. And this he did by his own oath, and the oath or verdict of an inquest of twelve clerks as compurgators, who inquired into his life, conversation and fame. On his acquittal, the ordinary pronounced him innocent, and absolved him from infamy; and he was discharged from prison, and freed from all incapacity and discredit. Yet notwithstanding the delivering up of a clergyable felon to the ordinary, the common law, as a matter of course, declared forfeiture of his goods and chattels, to be restored

[1] Bac. Use of Law. The scarcity of recruits for the priesthood was also sometimes, in the early centuries, supplied by compulsory levies of men.—See *ante*, vol. i. p. 481.

by purgation or pardon; and while in purgation the clerk was kept in prison, and could not buy more goods and chattels, or be a witness or a juror.[1]

Whether by learning to read one could get benefit of clergy.—The test as to ability to read when required sometimes led to a difficulty, for prisoners after sentence might sometimes learn to read, and pass the examination. In one case in 1560 this point arose. When in the usual course after capital sentence the prisoner demanded his clergy, and to be put to read the "neck verse" as a test of his qualification, he happened to be respited, and in the meantime learned to read sufficiently. It became then a solemn question, which all the judges of assize met to deliberate upon, namely, after the prisoner on first praying his book, and then being recorded as in fact not able to read, on a second occasion again demanded the book, and was then able to read, whether he was entitled to his clergy. To the credit of that age the judges held, that the prisoner should in that case be allowed the benefit of his late acquired learning, and so escape his doom; and yet it ought to be added, that the judges nevertheless sullied their fame by at the same time holding, that "the gaoler shall be punished for teaching him to read."[2]

Benefit of clergy not allowed to women.—One discreditable anomaly for a long time attended the practice of benefit of clergy. The boon was not allowed to women, because they could not be clerks; and so they suffered death for larceny and other small causes, though professed nuns were said to be entitled to it.[3] But a statute of James I. in due time allowed a woman this favour, except in burglary and robbery; and she was branded with the letter T on the brawn of the left thumb, besides whipping and the stocks, or one year in the house of correction.[4] And this branding was also directed to be done in open court, and the punishment following upon it long continued to be only one year's imprisonment.[5]

Peers and peeresses allowed benefit of clergy.—Peers early found out the awkward and disagreeable as well as discreditable effects of being burnt in the thumb, or

[1] R. v Warwick, 13 St. Tr. 1019. [2] Dyer, 205 a. [3] 2 Hale, P. C c. 51. [4] 21 Jas. I. c. 6. [5] 3 W. & M. c. 9, § 6.

being unable to read. On the trial of the Duchess of Kingston in 1776, when she was found by her peers guilty of bigamy, an important question arose, whether she was entitled to her clergy, and whether she was so entitled without being burnt in the hand or imprisoned, in other words, whether she could escape the usual punishment altogether. The judges were consulted by the House of Lords on this point. A statute of Edward VI. had expressly enacted, that a peer and lord of parliament, on alleging that he was a lord or peer of the realm, and claiming clergy, should, though he could not read, and without any burning of the hand, be entitled to be put on the same footing as "a clerk convict, which may make purgation." And a statute of Henry VIII., reciting Magna Charta, had also declared, that peeresses should be tried like peers by the peers. The judges, after elaborate examination of statutes and precedents, gave their opinion, that the duchess was in the circumstances entitled to be at once discharged without the burning or any imprisonment. The House adopted this opinion, and the Lord High Steward, Lord Bathurst, L. C., somewhat grudgingly, thus addressed her grace: "Madam, the lords have considered of the prayer you have made to have the benefit of the statutes, and the lords allow it you. But, madam, let me add that although very little punishment or none can now be inflicted, the feelings of your own conscience will supply the defect. And let me give you this information likewise, that you can never have the like benefit a second time, but another offence of the same kind will be capital. Madam, you are discharged, paying your fees."[1]

The branding of thumbs for clergy was done in open court.—It is useful to remember, that a long line of illustrious judges for three centuries and more had to see this branding of thumbs carried out before their eyes. Even Lord Mansfield had to sit with patience and witness what was done, so late as 1771, in the Court of Queen's Bench. We are told that Mr. Justice Aston pronounced sentence on a person guilty of manslaughter, that he should be burnt in the hand. "Lord Mansfield, C. J., having asked the senior master where the sentence in that case was executed," the reporter adds this to the answer. "Whereupon

[1] Duchess of Kingston's Case, 20 St. Tr. 643.

the present defendant John Taylor was accordingly removed backwards in a straight line from the bar, but in the face of the court (the doors of the inclosure still remaining open), and burnt in the hand by one of the marshall's people, who was prepared for that purpose." [1]

Abolition of benefit of clergy and branding.—At length in 1779, after reciting that all this branding was often disregarded and ineffectual, besides fixing a lasting mark of disgrace and infamy on offenders, power was given to the court in all cases, where burning of the thumb either of man or woman was competent for felony, to substitute a moderate pecuniary fine: or in all such cases, except manslaughter, to substitute not more than three public or private whippings. The private whipping was to be in presence of two persons besides the offender and the officer; and in case of women, those two persons were to be women.[2] At last even the small discretion thereby retained to burn thumbs was abolished, and this disturbing element in the trial of felons, called benefit of clergy, introduced by the Church and extended with the most unmeaning show of equity, first to all who could read, and next to all who could not read, was by a statute of 1827 for ever dismissed, with all its fires and its hot irons, from any place in our legal procedure.[3]

Partial abolition of capital punishments.—For a few centuries past great writers and thinkers have prepared society to believe that there were rather too many capital punishments. Montaigne before his age sagaciously observed with respect to these, that "all beyond simple death was cruelty. The legislator ought not to expect that an offender, who is not to be deterred by the apprehension of death, and by being beheaded and hanged, will be more effectually deterred by the dread of being exposed to a slow fire or the rack. It might be rather, that he may be rendered desperate." [4] And even among the ancients there were some striking instances of an apprehension, that capital punishment was perhaps a mistake. It is related by Herodotus, that Sabacon, King of Egypt, put no Egyptian to death for crime, but instead commanded the delinquent to carry a certain quantity of earth to his city, whereby

[1] R. v Taylor, 5 Burr. 2797. [2] 19 Geo. III. c. 74, § 3. [3] 7 & 8 Geo. IV. c. 28, § 7; 4 & 5 Vic. c. 22. [4] Montaigne, b. ii. c. 27.

the situation of the Egyptian cities was much elevated.[1] And the same historian says, that the Persians were restrained from killing any man for a single crime.[2] And this, as has been observed, was only allowing him the benefit of clergy.[3] And one ancient Egyptian king was thought to have made a great advance by substituting for capital punishment of robbery the lesser punishment of cutting off the robber's nose and banishing him into the desert, to live on quails or anything else he could catch.[4] The ancient Persians also on a question of life or death were said to take into consideration the previous life of the criminal, and strike a balance in the punishment awarded; and this was some mitigation.[5]

On the other hand, some legislators have given out, that there was nothing like severity in punishment. It was believed by the Incas of Peru, whose code allowed no discretion to the judge who pronounced sentence, that much of the immunity from crime in their empire arose from the inexorable severity of their laws; but part of this effect was attributed to the universal belief, that such laws were made by the sun, and therefore divine.[6] And Draco was said to have given as a reason for capital punishment, that the least offence deserved it, and that he could find no greater punishment for the most heinous.[7] Venice is said to have followed Draco, by making the smallest offence against the state punishable with immediate death.[8] And the disciples of Draco seem to have ruled the world up to nearly the present time; and their ideas still linger among mankind, and reveal themselves occasionally. It is true that whatever be the degree of punishment that is in vogue, it ought to be such as to be deemed degrading to suffer. There are few countries, indeed, which in that respect resemble Siam, where, though there were severe sentences, the pillory and exposure to wild bulls, yet the criminal, after enduring them, stood as high in the estimation of society as before, and even boasted of the number of his punishments.[9]

Feudal system encouraged capital punishments.—Whatever

[1] Herod. b. ii.. [2] Ibid. b. i. [3] Barringt. Stat. 461. [4] 2 Wilk. Anc. Egypt, c. 8. [5] Epiph. b. ii.; Herod. b. i. [6] Com. of Incas, b. ii. c. 13. [7] Plut. Sol. [8] 10 Univ. Mod. Hist. 176. [9] 3 Univ. Mod. Hist. 346.

be the right view to take of the morality and expediency of capital punishments, such elementary scruples have seldom much troubled the world. The ancients probably seldom gave a thought as to whether there was anything of inherent value in a life *per se*, or whether it was of much consequence to keep it or not. The feudal system shows, that this misgiving could scarcely have troubled its powerful chiefs, who were little kings, ruling over their principalities with absolute and unrestrained dominion. In this country the right of pillory, tumbril, and gallows went with the manor, or could be claimed at least as appurtenant to the land by prescription; and even the right to hold pleas of the crown could be held by prescription.[1] Each lord could try and hang a thief, if committed within his franchise, this being called infangthief; when he could do so if the thief was caught elsewhere, it was called outfangthief.[2] And it is recorded, that the lord of Scilly did judgment on his felons by taking them to a certain rock in the sea with two barley loaves and a pitcher of water, and then leaving them on the rock till the tide drowned them.[3] Voltaire said, that this or the like was the practice all over Europe; and that when he bought an estate he succeeded to several gallows as parts of its appurtenances.[4]

Excessive capital executions formerly in England.—But England seems at an early period to have gone into excess in capital punishments. Fortescue said, in Henry VI.'s time, that more people were executed in England for highway robbery alone than in France for all crimes in seven years. Public opinion gradually revolted and tried to screen the victims. In 1809 only about one-eighth of all those sentenced to capital punishment were really executed.[5] Juries also, in order to prevent capital punishment, committed many charitable perjuries; and in one case actually found that a ten-pound note was of less value than forty shillings.[6] Sir W. Grant said so great became the hostility to our cruel laws, that there was amongst prosecutors, witnesses, juries, judges, and the ministers of the crown, a general confederacy to prevent the law being executed.[7]

[1] Year Book, 20 Ed. I. 137, 164. [2] Year Book, 30 & 31 Ed. I. App. 500. [3] Year Book, 30 & 31 Ed. I. 37. [4] Barringt. Stat. 350. [5] 15 Parl. Deb. 371. [6] 18 Parl. Deb. 653. [7] Parl. Deb. 1810.

While, on the other hand, Lord Wynford urged, when it was proposed to repeal the barbarous law of capital punishment for stealing five shillings, that, if it were abolished, the people of England could no longer sleep with safety in their beds. In 1820 law reformers were still complaining, that capital punishment was awarded for stealing in a shop to the value of five shillings, and for destroying a tree, or for wounding cattle.[1] Under a cruel statute of 4 George I. relating to the receiving of stolen goods, only one person, and that person Jonathan Wild, had been convicted in about one hundred years after its passing.[2] In 1823, while France had only six crimes punishable with death, England had two hundred.[3]

Christian religion had effect on capital punishment.—The principles of the Christian religion could scarcely fail to tell on the question of capital punishment. Up to the fifth century it was the current opinion, that Christians could not bear a part in the execution of criminals.[4] St. Augustine denounced the destruction of criminals in the circus, on the ground of its ministering to the ferocity of the people.[5] And Julian had to remove Christians from the office of Prefect, because they would not put criminals to death.[6] Cato Joannes, Emperor of the West, won all hearts by abolishing capital punishment.[7] And it is said, that the Emperor Henry VII. ordered the question to be debated, whether a judge should have the power to punish with death; and he decreed, that no judge should have such a power.[8] During the Middle Ages there was more or less of a controversy going on about the lawfulness and utility of capital punishments. While Sir Thomas More advocated in his *Utopia* the restriction of this extreme punishment to only a few well-defined cases, Hobbes was inclined to the opposite view.[9] Coke said it was lamentable to see so many Christian men and women strangled on the gallows, the frequency of the punishment making it so familiar as not to be feared.[10] The Reformation had tended to keep alive the subject; and Voltaire and Montesquieu exposed the unmeaning severity of such sentences. Beccaria at length

[1] 1 Parl. Deb. (2nd) 227. [2] Ibid. 230. [3] Sir J. Mackintosh, 9 Parl. Deb. (2nd) 410. [4] 1 Mosh. Ch. Hist. 466. [5] 3 Milm. Hist. L. Ch. 457. [6] 2 Ibid. 82. [7] A.D. 1118; Gibb. Rom. Emp. [8] Volt. Becc. c. 10. [9] More's Utopia; Hobbes' Leviathan. [10] 3 Inst. Epil.

grappled closely with the subject, and succeeded in shaking the faith of those, who had so long blindly believed in them.

Beccaria and other opponents of capital punishment.—The masterly Beccaria observes, that mankind, when influenced by first impressions, love cruel laws, although, being subject to them themselves, it is the interest of every person that they should be as mild as possible; but the fear of being injured is always more prevalent than the intention of injuring others.[1] And Voltaire adds, that those ingenious punishments which endeavour to render death horrible, seem rather the invention of tyranny than of justice.[2] "If it be objected," says Beccaria, "that almost all nations in all ages have punished certain crimes with death, I answer, that the force of these examples vanishes, when opposed to truth, against which prescription is urged in vain. The history of mankind is an immense sea of errors, in which a few obscure truths may here and there be found.[3] A punishment, to be just, should have only that degree of severity which is sufficient to deter others. Perpetual slavery has in it all that is necessary to deter the most hardened and determined, as much as the punishment of death."[4] Beccaria and others have argued, that men have no right to put their fellow creatures to death; that society and the laws are not founded on any such right; for the laws are only the sum of the smallest portions of the private liberty of each individual, and represent the general will, which is only the aggregate of that of each individual. No man ever gave to others the right of taking away his life; for, as he has no right to take his own life, he cannot give such right to others. It has been said, that the right of inflicting capital punishment cannot be put higher than as part of the right of self-defence, with which societies as well as individuals are endowed.[5] And that punishment, in so far as it is only by way of retribution or vengeance, is not man's province.[6]

If capital punishment be justifiable.—It may well be urged, that if law is merely the sum of the restrictions put on human conduct, in order that all may follow their occupations with greater security, it can be no part of the business of law to usurp the function of administering

[1] Becc. c. 34. [2] Volt. Becc. c. 2. [3] Beccaria, c. 28. [4] Ibid.
[5] Sir J. Mackintosh, 39 Parl. Deb. 783. [6] Whately's Essays.

eternal justice, or to inflict retribution or vengeance, under the plea that the world must be kept right. The world is obviously not in its keeping, except to a very limited extent. Every chapter and verse of the law begins and ends with the elementary principle, that no man's life or liberty is to be taken away or restricted, either on the ground of crime or anything else, except so far as it is necessary, and no further.[1] In applying the law of self-defence, the rule is, that life may be taken only when one's own life is in jeopardy and cannot otherwise be saved, but in no case is it allowed deliberatelyto kill the assailant long after the danger is passed, if there is an equally effectual way of disarming and disabling him for the future without killing him. Not even in war is it tolerated, that a captive shall be killed, merely to save the trouble and expense of keeping him alive. All that is gained by capital punishment can be attained by keeping the prisoner alive; and the risk of occasional mistakes in killing an innocent man, which must occur under every law and every procedure, however well contrived, is wholly avoided by this alternative of saving life. If then the only advantage in favour of capital punishment resolves itself into vengeance, or what is called terror, and the desire to execute what is supposed to be eternal justice, this is only the common mistake which the law has been making from the beginning of the world. The vain and impotent efforts of fallible and shortsighted beings to grapple with this vast subject have been again and again demonstrated; and Law has had to retire humbled and defeated times without number, and step by step, from every one of the false positions it has presumptuously taken up under so ambitious an impulse; and history is little else but the record of these mistakes and self-delusions. It has been the function of the legislature to rise superior to the law—to correct its narrowing views and practices; and the whole statute-book is but an inventory of these corrections. Life being the gift of

[1] "The principle, that you shall do no more than the necessity of the case requires, when the excess may be in any way injurious to another, is one which pervades every part of the law of England, criminal as well as civil, and indeed belongs to all law that is founded on reason and natural equity."—*Per Dallas, J.*, Deane *v* Clayton, 7 Taunt. 519.

God, it is not for man to tamper with it, or to presume on his mere blind possession of the power to kill, that he can make free with it as if it were his own. Each man's life is not his own; and by no reasoning can he persuade himself, that the life of another can ever legitimately become his, or can ever become the property of any number of individuals, associated for government or any other purpose. And the repression of crime obviously does not depend on the terror of punishments, else all the hideous atrocities already referred to, and once deemed the perfection of reason, ought to be revived and rigorously administered. The most outrageous criminal, when once he has demonstrated that self-restraint is no part of his nature, may well be overpowered by force, disarmed, and kept apart, never more to be trusted among men; but further than this, the necessity of self-preservation, whether on the part of one or of all his fellow citizens, does not require to go.

CHAPTER IX.

VARIATIONS IN FOREGOING RIGHTS CAUSED BY AGE OR INFANCY.

Variations in rights caused by infancy.—All the rights and wrongs hitherto considered, have been treated mainly in reference to the normal adult man. We next consider how far these suffer variation in consequence of the state of infancy through which each human being must pass. In the eye of the law the life of a human being is sacred from its first beginnings; and the protection against murder and all the lesser crimes and wrongs done to the body is the same, whatever be the age, sex, or condition, mental or material, of the individual. Yet some things require more minute attention, not only with respect to the stage of this life, at which crimes and wrongs begin to be capable of being committed, but also in respect of the way in which infant life is subjected to certain compulsory duties, which have no place in the condition of an adult.

When human life begins.—The first important rule is, that from the time any woman has conceived or become quick with child, and wholly irrespective of legal marriage existing or not, the law begins to throw out its defences around the mother, so as to secure the continuation of life to the child; and the mother as well as all strangers are equally punishable in certain circumstances for checking or intercepting the course of nature in the advance towards maturity. With this view, not only the mother, but all accomplices are punishable for attacks and violations of this rule. All commit a crime (1) in attempting to procure abortion; (2) in injuring the life of a child newly born; (3) in concealing the birth of a child; (4) in exposure of children; and (5) in child stealing.

All those offences are found more or less directly to tend towards destroying human life in its earliest stages, and to be phases of infanticide.

Ancient and savage practices as to abortion.—The criminality of abortion has been more clearly marked in modern times than among the ancients. The general opinion among the ancients was, that the unborn child was an inseparable part of the mother, and that she was subject to no control whatever in doing as she pleased. Utilitarian philosophers were found to advocate the prevention of birth as in many instances an act of mercy. In Greece Aristotle not only countenanced abortion, but advised that it should be enforced by law, when population had exceeded certain assigned limits. No law in Greece or in the Roman Republic, or during the greater part of the Empire, condemned it; though in the latter days of the Pagan Empire it was feebly discountenanced. It was obviously viewed even then as but a venial irregularity. The language of the Christian writers gave forth a very different report; and they boldly denounced it as murder, and in the same category as infanticide. While the Pagan viewed the unborn child with indifference, the Christian singled it out from the first moment of animation as an immortal being. To rescue from damnation even an unborn child was a new view, which appealed to the imagination, and laid the foundation of that widespread reverence for human life even in its earliest moments, which has taken root in all modern civilisation.[1]

Law as to attempts to procure abortion.—Every woman with child, who takes poison or other noxious thing, or

[1] 2 Lecky, Hist. Mor. 22. The causing of abortion was denounced by the Church as nothing less than murder. Tertullian in the second century, interpreted the prohibition against murder to include it.—*Tertull. Apol.* c. 9. And it was a crime which the old Roman law punished with banishment, and sometimes with death.—*Digest.* 48, 8, 8 ; *Ibid.* 47, 19, 39. Among the Kaffirs the practice is common, and when discovered, as it seldom is, a fine is imposed.—*Maclean's Kaffirs*, 62. The same view prevails among great varieties of semi-barbarous tribes.—15 *Univ. Mod. Hist.* 62. But in Formosa, where males were prohibited from marrying before 40, and females before 36, if a female under that age was pregnant, she was by order of the magistrate obliged to submit to abortion.—*Ferg. Civ. Soc.* 233.

uses any instrument or other means to procure her own miscarriage; and also any other person who does the like, in order to procure miscarriage of a woman, whether such woman be or be not with child at the time, is now guilty of felony.[1]

Moreover every person who supplies or procures poison or other noxious thing, or any instrument or other means, knowing that such means is to be used to procure miscarriage of a woman, whether she be or be not with child, is guilty of a misdemeanour.[2] It was formerly the law in such cases, that strict proof was required, that the woman was quick with child, or was with child, before the offence could be proved.[3] But now it is not essential under the one enactment that the woman should be in point of fact quick with child;[4] or under the other enactment, that she should be with child at all. The particular means used is now also immaterial, and if the intent exists, a thing, not noxious in itself, may yet be criminally administered in circumstances which make it noxious; such, for example, as savin.[5] Yet the thing administered must usually be in itself noxious, and not merely believed by the person taking it to be so.[6] And the intent may be inferred from a course of treatment, or repeated acts done systematically.[7] And it is the intent of the person supplying the drug, that is alone material.[8] As it is possible for a person to supply a poisonous drug with a knowledge of the object for which it was obtained, and yet to be in no way chargeable with murder, he may thus be convicted under this enactment.[9]

Offence of concealment of birth.—Another of the common offences committed against infant life in the earliest stage is the attempt to conceal a birth; for this is generally only a consequence or sequel to the unlawful destruction of the

[1] 24 & 25 Vic. c. 100, § 58; 27 & 28 Vic. c. 47. Penal servitude for life, or not less than five years, or imprisonment not exceeding two years, with or without hard labour and solitary confinement.

[2] 24 & 26 Vic. c. 100 § 59; 27 & 28 Vic. c. 47. Penal servitude for five years, or imprisonment not exceeding two years with or without hard labour.—24 & 25 Vic. c. 100, § 59; 27 & 28 Vic. c. 47.

[3] R. v Phillips, 3 Camp. 77; R. v Scudder, 1 Moody, C. C. 216.
[4] R. v Goodhall, Den. C. C. 187; 2 C. & K. 293. [5] R. v Coe, 6 C. & P. 403; R. v Calder, 1 Cox, C. C. 348; 3 Campb. 73. [6] R. v Isaacs, 1 L. & C. 220. [7] R. v Perry, 2 Cox, C. C. 223. [8] R. v Hillman, 1 L. & C. 343. [9] R. v Fretwell, 1 L. & C. 161.

child; and being most frequent in the case of illegitimate births, it is usually attributed in the first stages to the fear and shame that may overtake the parents. At one time it was enacted, that, if a mother of a bastard child should endeavour to conceal its dead body, this should be treated as conclusive evidence that she had murdered the child, unless she could prove by one witness that the child had been born dead. But this was found to be too stringent and severe a law, though it was tried for 180 years,[1] and a Danish and Swedish law to the same effect as our own was made about the same time.[2] The present enactments against procuring abortion and concealment of birth, slightly altered, were next adopted as the proper and adequate remedies for the difficulty.[3]

The modern law as to concealment of birth is this. If any woman shall be delivered of a child, every person, who by any secret disposition of the dead body of the child, whether such child died before, at, or after its birth, shall endeavour to conceal the birth thereof, shall be guilty of a misdemeanour.[4] And any person tried for and acquitted of the murder, may be convicted of this minor offence under the same indictment, if it appear, that the child had recently been born, and that he or she did so conceal it.[5] Thus whether the mother joins in the endeavours of others, is now wholly immaterial; and whether she is convicted or not, others may be so. And many nice and difficult questions can no longer arise, as they once did, as to whether the mother had made preparation for the birth, and whether the accomplice was present at the delivery. The offence, it will be observed, presupposes that the child is already dead, when the body is endeavoured to be secretly disposed of. It also presupposes that the child was born alive, or might have been so.[6] And the endeavour to conceal the body is generally

[1] 21 Jas. I. c. 27; 43 Geo. III. c. 58. [2] Leg. Dan. b. vi. c. 6, § 9; Leg. Swec. c. 16.

[3] A law of Henry II. of France compelled an unmarried woman, under pain of death, to declare her pregnancy to a magistrate, which penalty she incurred if the child perished.—*Montesq.* b. xxvi. c. 3.

[4] 24 & 25 Vic. c. 100, § 60. Imprisonment, not exceeding two years, with or without hard labour. [5] Ibid. [6] R. *v* Berriman, 6 Cox, C. C. 388.

inferred from the conduct of the mother in concealing her pregnancy: or in making no preparations for her delivery.[1] The disposing of the body need not be a final disposal, if it is such as to be inconsistent with the intention to make known its final disposition.[2] Thus it is enough, if it be put in a field, where there was no thoroughfare, and out of the way of ordinary frequenters of the field.[3] Yet the disposal must be a positive act done, in contradistinction to merely dropping the child at birth, and leaving it where it fell.[4] And it has been said, that there may be this concealment, though a confidant may have been privy to the fact of the birth, and even to the crime itself; for the concealment obviously means concealment from those in the habit of meeting with the prisoner in daily life.[5]

The exposure of newly born children.—Such are the dangers surrounding the stage of infancy immediately before and contemporaneous with the birth, namely, procuring abortion and concealment of the birth and the dead body. The next stage is the life of the child immediately after the birth, but in the helpless age which continues for some years thereafter. Here arises another crime, called the exposure of children, and this also has been guarded against by modern law with scrupulous care.

The exposure of children when newly born, as Gibbon observes, was the prevailing and stubborn vice of antiquity. It was sometimes prescribed, often permitted, and almost always practised with impunity. Valentinian at length prohibited it; but it required the Christian religion and capital punishments to eradicate the practice.[6] This practice of exposing infants, which was so lightly dealt with in ancient nations, was denounced vehemently by the early Christians in the second and third centuries as nothing less than murder.[7] At last the Church excommunicated all parents who were guilty of the practice; and rules were laid down for rescuing the children, and allowing the charitable guardians to keep possession of them for purposes of education. Not only was exposure of children

[1] R. v Higley, 4 C. & P. 366. [2] R. v Opie, 8 Cox, C. C. 332; R. v Perry, Dearsl. 471. [3] R. v Brown, L. R. 1 C. C. 224. [4] R. v Coxhead, 1 C. & K. 623. [5] R. v Morris, 2 Cox, C. C. 489. [6] Gibbon, Rom. Emp. c. 44. [7] Athenag. Leg. pro Christ. 38; Bing. Chr. Antiq. b. xvi. c. 10.

gradually denounced and finally rooted out by the influence of Christianity, but there were also laws directly condemnatory of such a practice. There is a doubt, whether the Roman law classed infanticide with murder, and only punished it less severely, or treated it as a different crime. But Valentinian, in A.D. 374, made it a capital offence.[1] Again in 529 Justinian decreed, that the father lost all legitimate authority over his child by exposing it; and that the person who saved it could not by that act deprive it of its natural liberty. But this law applied only to the Eastern Empire; and in part at least of the West exposed infants continued for centuries to be reared as slaves, till the general extinction of slavery in Europe.[2] Christianity soon modified and extinguished the practice of exposure of children; and in the sixth, seventh, and eighth centuries, a Christian foundling hospital existed in three places. Thereupon the duty of making some charitable provision for children born in such circumstances, that their life was unguarded by the natural piety of parents, became slowly recognised. And early in the middle ages the practice began of endowing foundling hospitals.[3] A law of the Spanish Visigoths in the seventh century punished infanticide and abortion with death or blindness.[4] In the Capitularies of Charlemagne infanticide was treated as homicide.[5] And it became early in the history of Christianity a practice of Christian virgins to collect exposed children and take them in charge to the Christian church.[6]

Law as to exposure of children.—This second danger to the lives of young children, which consists in exposing or abandoning them to their fate, without directly murdering them, is treated by our law as a serious crime. Whosoever unlawfully abandons or exposes a child under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall be likely to be permanently injured, is guilty of a misdemeanour.[7]

[1] Cod. Theod. lib. ix. tit. 14, 15; Cod. 8. 3, 2. [2] 2 Lecky, Hist. Mor. 32. [3] Ibid. 34. [4] Leges Wisigoth. lib. vi. tit. 3, lex 7; 2 Lecky, Hist. M. 34. [5] Capit. vii. 168. [6] Montfalcon, Hist. des Enf. Trouvés, 74.

[7] 24 & 25 Vic. c. 100, § 27; 27 & 28 Vic. c. 47. Penal servitude for five years, or imprisonment not exceeding two years, with or without hard labour.

The word "exposure" used in this enactment was held to meet the case of a mother who sent a child five weeks old in a hamper to be carried by railway, without disclosing the contents;[1] and the case of a father, who lived separately from the mother, and who on the mother leaving the child outside his door, did nothing and left it lying.[2] When the child is older than two years, and death results, murder or manslaughter will be the crime that is committed.

Infanticide or murder of children.—While exposure of children usually means something short of actually killing them, and rather indicates a leaving of them to the chance, and often the favourable chance, of their being taken care of by others, the next peril that besets infants of tender age is infanticide, or actual murder. And here again we differ widely from the ancients. They deemed the lives of tender children of little or no value, and allowed parents to do with them almost what they pleased; while our law guards the youngest, the most helpless, the most deformed and sickly of them, with the same jealous care that it bestows on the most powerful adult in the realm. It is salutary for a moment to notice, how recklessly and with what want of "Christian charity" the ancients acted in this respect, being little superior in their practice to those savages that now roam the forests and lead precarious lives, without any settled home.

Ancient and savage practices as to infanticide.—Though infanticide, like abortion, is a crime which civilisation has ranked with murder, with barbarians it is a venial, if not a praiseworthy practice. Among savages, whose feelings of compassion are faint, whose notions of the dignity of life are a blank, and whose nomadic habits are incompatible with incumbrances, the usual custom is for the parent to decide whether he will keep the child or destroy it. In many countries and ages a notion has also prevailed, that children, as being a favourite possession of parental affection, are acceptable as a sacrifice to the gods.[3] Diodorus Siculus wondered what the Egyptians could mean by prohibiting infanticide; and Tacitus noticed the same care

[1] R. v Falkingham, L. R., 1 C. C. R. 222. [2] R. v White, L. R., 1 C. C. R. 311. [3] Warburton, Div. Leg. vii. 2.

of infant life as a remarkable peculiarity of the Jews.[1] So severe was the Egyptian law, that it condemned a parent, who had killed his child, to sit three days and nights embracing the dead body.[2] Aristotle had other views. He said that, to avoid an excess of population, some law must be laid down, if it be not permitted by the customs and habits of a people that children should be exposed, because a limit must be fixed to the population of the state. He proposed accordingly to limit the time for marriage, and the number of children which two married persons might have.[3] And diseased and deformed children were held by the Greeks well got rid of at once, being nothing but a burden.[4] Solon had tried to abolish the practice of infanticide in another way, by enacting that no dowry should be given by a bride on her marriage, but that all she should bring with her were three suits of clothes and a few household articles.[5] The ancient Romans were also allowed to expose deformed children.[6] The Romans, however, had a different view as to population from the Greeks, and encouraged propagation, fining those who did not marry, and rewarding those who had many children. They exempted from troublesome offices those who had three children; and fathers were not allowed to be tyrannical in refusing to let their daughters marry.[7] At length Constantine, in the year of his conversion to Christianity, by a decree A.D. 322, ordered children, whom their parents could not support, to be supported by the state. In A.D. 331, a law was passed, whereby any person adopting an exposed child, could deal with it as his own property.[8] It was not till A.D. 374, that infanticide was made a capital offence.[9] The notions of savages on this subject[10] differ little from those of

[1] Diod. Sic. b. i.; Tac. Hist. b. 5. [2] 2 Kenr. Egypt, 54. [3] Arist. Pol. b. vii. c. 16. [4] Plut. Lycurg. [5] Plut. Sol. [6] Dio. Hal. b. ii. [7] Montesq. b. xxiii. c. 21; Gibbon, Decl. & F. c. 44. [8] Cod. Theod. lib. v. tit. 7, lex 1. [9] Ibid. lib. ix. tit. 14, lex 1.

[10] The Maoris of New Zealand are given to infanticide.—*Dieffenbach*, p. 16. And in Tahiti with some of the higher classes not only was infanticide practised, but a woman who bore a child was treated with reproach.—*Ellis*, *Pol. Res.* vol. i. p. 334-6. The Paraguay Indians, as a matter of policy, have no tie of marriage, and a woman kills all but one child, selecting that which is likely to live longest.—*Azara's Amerique.* In Benin, Africa, twins were thought to be a bad

Greece and Rome. All were alike blind to the sacredness of life.[1]

Murder of infant child.—In our law not only is the exposure of children, whereby their health is injured, a misdemeanour; but if the child dies, then it is no less than murder. The time at which an infant is viewed as a human being separate from the mother, and at which the special care of the law begins, is when it has an independent circulation. Before the child has arrived at that stage, it is identified with the mother; and at common law it has been held, that whoever strikes a woman great with child, so that the child within her is killed, is guilty neither of murder nor of manslaughter of the child, because, as Hale said, it was not then *in rerum naturâ*.[2] This reason, however, was obviously inadequate, for all that precedes the delivery and birth is as much *in rerum naturâ* as what follows. The real reason is, that, when the legislature declared or assumed murder to be a crime, and the subject of it to be the life of a human being, without defining what a human being was, it became absolutely necessary for courts of law to draw the line and say at what stage of growth any one can be said to become such a human being. And that stage, at which the child appears a separate and visible human being, was obviously the only conclusion that could be come to. If any offence could be committed with reference to the anterior condition, that was a matter fit to be considered by the legislature, and the legislature alone. The courts of law indeed have constantly to define and reduce to precision the vague and unguarded language in which all statutes necessarily abound; and they usually do this by putting the popular meaning on ordinary words, so long as an intelli-

omen, and mother and children were put to death.—6 *Univ. Mod. Hist.* 582. In Alaska the mothers, owing to the difficulty of supporting girls, stuff their mouths with grass and leave them to perish.—*Dall's Alaska*, 139. And deformed children are also usually killed. —*Ibid.* In China and in Africa the same fear of want was deemed good cause for destroying children. The Todas assign the function of suffocating children to an old woman, who performs the duty for a small hiring.—*Marshall's Todas*, 195.

[1] Montesquieu observed, that while in Europe more boys than girls were born, it was the reverse in Japan; while in Bantam there were ten girls to one boy.—*Montesq.* b. xxiii. c. 12.

[2] 1 Hale, P. C. 433.

gible result can thereby be arrived at. This was accordingly done. The legislature at first had overlooked the fact, that there might be serious offences possible with reference to the state of pregnancy; and it had at last seen and provided for its first omission to a great extent by treating as separate and independent crimes the procuring of abortion and the concealment of the dead body of newly-born children, already noticed. And Coke says, while the offence now mentioned was not murder, still it was a misprision.[1] Moreover, though to kill a child in the womb was deemed not murder, yet it was at the same time held, that if the child was maliciously killed in the act of being born, though before it breathed, this would be murder.[2] And it was murder, if the child had in consequence of some potion been prematurely born alive, and then had died immediately.[3]

In order to establish the crime of murder of an infant, it is thus necessary to show, that the child was completely born, and had an independent circulation.[4] But it is not necessary, that the umbilical cord should have been separated;[5] or if completely born, that the child should have breathed thereafter.[6]

Child-stealing and kidnapping.—The common law supplied no adequate punishment for the stealing of young children, or of any human being, it being only a misdemeanour punished by fine and imprisonment.[7] And this defect was sought to be remedied by the old writ resembling *habeas corpus*, which however applied with effect only when the body was extant and could be produced. In 1682, one Willmer kidnapped a boy of thirteen, and sent him to Jamaica, upon which a writ *de homine replegiando* was sued out. He was arrested, and tried and convicted. Another kidnapper was tried and fined 500*l.*; and it appeared that about 500 children had been carried off by captains of ships within two years, and practically sold, under the guise of apprentices, in the West Indies.[8] The kidnappers of Bristol excited great notice in their day.[9] A statute of Elizabeth had

1 3 Inst. 50. 2 R. *v* Senior, Mood. C. C. 346. 3 R. *v* West, 2 C. & K. 784. 4 R. *v* Wright, 9 C. & P. 754. 5 R. *v* Reeves, 9 C. & P. 25. 6 R. *v* Sellis, 7 C. & P. 850. 7 East, P. C. 429. 8 8 St. Tr. 1347. 9 North's Guilford, 216.

passed in 1601, which made the kidnapping of the inhabitants of four northern counties a felony; but the act applied only to those localities.[1] Till 1814 the thief might be prosecuted for stealing the child's clothes, but the body not being deemed goods and chattels, the common law could take no notice of the offence, and could not adequately deal with it.

The stealing of a child is now an offence separately treated, being obviously not sufficiently punishable under the general head of maltreatment, murder, or any civil proceeding; for over and above any direct and immediate injury that may be inflicted on the person of the child, there is the grievous wrong of depriving parents and guardians of their charge, and subjecting them to the worst suspicion, that the child may have met an unknown or cruel fate. The defect in the law was first supplied in 1829, and now it is enacted, that whosoever unlawfully, either by force or fraud, leads or takes away, decoys, entices away, or detains any child under fourteen years, with intent to deprive any parent or guardian of the possession of such child, or with intent to steal any article upon or about the person of such child, and whosoever knowingly harbours or receives such child, is guilty of felony.[2] This enactment applies to illegitimate, as well as legitimate children; but as disputes sometimes arise as to the legal custody of children, those who so dispute are not subject to this severe punishment, as will be noticed shortly.

Detaining or decoying children from proper custody.— The stealing or decoying of children is to be carefully distinguished from that detention or attempt at possession of a child, which may be a fair subject of dispute between parents of the child, or between guardians and others, who have been lawfully intrusted with, or may have acquired lawfully, such possession. As between the parents of illegitimate children, or parents living apart or separated judicially, and guardians of children whose

[1] 43 Eliz. c. 13.

[2] 24 & 25 Vic. c. 100, § 26. Penal servitude, not exceeding seven, nor less than five years, or imprisonment with or without hard labour, not exceeding two years, and if a male under sixteen with or without whipping.

parents are dead, certain rules prevail as to the custody, which may occasion contention; and in vindicating supposed rights, violence or stratagem may often be resorted to by one party or the other without any unlawful intention, and no criminal punishment in such cases is proper or necessary. Hence it is provided, that no person who claims a right to the possession of a child, no mother, and no person claiming to be the father of an illegitimate child shall be liable to prosecution under the above enactment on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof.[1] This exception to the general rule allows those disputed questions which often arise between parents or relatives, as to the custody of children, whether legitimate or illegitimate, to be solved in some civil court of competent jurisdiction, whether the Divorce Court, or Chancery, or Common Law Divisions of the High Court. It will be seen from the Sixth Chapter of this work, relating to *habeas corpus*, that there are other remedies for settling such disputes, without leaving them to be disposed of as incidental to some criminal charge. It is true there is another aspect which this head of law bears, where the child decoyed or detained is a female; but as in that case the object of the detention has usually something to do with the sex, rather than the age of the child, this falls more properly to be treated in the next chapter, under the head of "Variations of the Law caused by Sex."[2]

Indecent offences to female children.—The subject of indecent offences as to children belongs to the title of sex, and will be treated under that head in the next chapter.

Starving children.—It has been noticed in the chapter on "Poor," that when any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his child, being in his custody, under the age of fourteen, whereby the health of the child is or is likely to be seriously injured, he shall be liable to be convicted.[3] When the starving causes the death of the child, the offence then becomes one of manslaughter or murder, according to

[1] 24 & 25 Vic. c. 100, § 56. [2] See Chap. x. [3] 31 & 32 Vic. c. 122, § 37. See *ante*, p. 57.

circumstances, and will be found treated under those heads in Chapter IV.[1]

Desertion of children.—The desertion of children, so far as such desertion leads to their being chargeable to the parish, was treated of under the head of Poor, the provisions of the Vagrant Act being applicable to this offence.[2] And as to the maintenance of deserted children, this also is treated elsewhere.[3]

Ill-treatment of children and apprentices.—The ill-treatment of children is a comprehensive phrase, which includes various kinds of wrongs and offences. If the treatment consists of beating and cruelly assaulting any child under fourteen, then the proper denomination of the offence is that of an aggravated assault, for which justices usually determine the proper punishment in a summary way.[4] If the treatment lead to death, then the offence may come under the head of murder or manslaughter according to circumstances.[5] As regards apprentices, if under the age of fourteen, they are in the same position as children; if above that age, they differ in scarcely any respect from adults, who can sue for assault or false imprisonment, or breach of contract under their indenture, and thereby can adequately protect themselves.

Overworking children in factories and workshops.—Not only has the law protected the lives of children in the manner already described against direct violence and wrong, but it has also gone further for no other reason than because children are incapable of taking due care of themselves and of judging what is best. An adult is allowed to make contracts of any kind, subject to scarcely any other restriction than such as his views of his own interest may dictate. It is otherwise with children. Their judgment is immature; they often desire what is not good for them; and moreover, parents, in the selfish pursuit of profit, or yielding to the bitter fate of poverty, seek by the labour of their children to support themselves more comfortably. Children thus enter into contracts and hire themselves into services in unwholesome employments, altogether incompatible with their own health and best prospects. The law steps in

[1] See *ante*, vol. i. p. 362. [2] See *ante*, Chap. vi. [3] See Chap. vi.
[4] See Assault, Chap. iii. vol. i. p. 311. [5] See Murder, Chap. iv. vol. i. p. 362.

between the parent and the child, between the child and the employer; and dictates to some extent whether and how far this injurious overwork may go on at all, and if at all, then subject to what restrictions, more especially as it so seriously interrupts the proper business of tender years, namely, education at school. One of these employments, which children are apt to engage in, is factory labour, which is of various descriptions. No child under the age of ten years is allowed to be employed in any factory or workshop, or indeed in any employment.[1] And not in a silk factory, if he is under eight.[2] And a child under fourteen shall likewise not be employed in a factory or workshop, unless he has obtained a certificate as to his proficiency in learning.[3] In some of the factories no child or young person is allowed to be employed at all; and in others, variations of age are allowed by statute or by order of the Secretary of State. And the parent of a child under fourteen is bound to send his child, when employed in a factory or workshop, to school for certain hours in the week; and the occupier of the factory shall pay the school fees and deduct the same from the child's wages.[4] The hours of work for children under fourteen in factories are strictly defined by the statutes, so as to avoid overwork.[5] All the children employed in a factory, as well as young persons and women, are to have the time allowed for their meals at one and the same hour of the day, and employment during that interval is strictly forbidden.[6] And not only are children in factories and workshops under the age of fourteen years subject to restrictions as to the hours of work, but young persons also, that is to say, those under the age of eighteen; and in general, ten hours a day, and in some cases twelve hours, constitute the full time of work, and half of Saturday, with intervals for meals, which are strictly defined by statute.[7]

Overworking children in mines.—The same public policy which induced the legislature to interfere, and restrict the

[1] 39 & 40 Vic. c. 79, § 5; 37 & 38 Vic. c. 44, § 13. [2] 7 & 8 Vic. c. 15, § 29. [3] 37 & 38 Vic. c. 44, § 12; 39 & 40 Vic. c. 79, § 11. [4] 7 & 8 Vic. c. 15, §§ 38, 39; 39 & 40 Vic. c. 79, § 7. [5] 7 & 8 Vic. c. 15, § 31; 16 & 17 Vic. c. 104; 37 & 38 Vic. c. 44. [6] 37 & 38 Vic. c. 44, §§ 7, 8. [7] 7 & 8 Vic. c. 15; 13 & 14 Vic. c. 54; 30 & 31 Vic. c. 146; 37 & 38 Vic. c. 44.

working of children in factories and workshops, has led to like restrictions in mines. No boy under the age of ten, and no girl of any age, can be lawfully employed in any mine below ground.[1] If a boy is under eighteen, he cannot be employed underground more than a certain number of hours in any week, with suitable intervals.[2] And when a boy above ten and under twelve is employed in a mine, he must be made to attend school for a sufficient number of hours per week.[3] And though girls or boys above ten may be employed above ground in connection with mines, yet the number of hours is restricted, and their school attendance is enforced.[4] No young person under eighteen is to be employed to take charge of any engine, windlass, or gin connected with the mine.[5]

With regard to the *metalliferous* mines, some variation in the above rules exists. No boy under twelve and no girl of any age can be employed below ground.[6] And for boys under eighteen, when employed below ground, the hours of work are limited.[7] And no boy under eighteen, is to be employed in charge of an engine or windlass.[8]

Overworking children in agricultural gangs.—The same kind of restrictions is put on the work of children in agricultural gangs. No child under ten shall be employed in an agricultural gang, and no female shall be employed in the same gang with males, or in any gang, unless there is a female gang master over it, duly licensed, and who may be expected to keep some order in the work.[9]

Ill-usage of children by chimney sweeps.—One other kind of employment is debarred from children, except under close restrictions, owing to the danger of cruelty and unwholesome employment. This is the trade of a chimney sweep. Not only does a chimney sweep require to be licensed,[10] but he cannot lawfully employ a child under ten in any part of his business.[11] No chimney sweep is allowed to enter a house for the purpose of cleaning chimneys, having with him any person under the age of sixteen, as an apprentice or under his control, and this youth is on no account, or for any purpose, to be present in the house at

[1] 35 & 36 Vic. c. 76, § 4. [2] Ibid. §§ 5, 6, 7. [3] Ibid. § 8. [4] Ibid. § 12. [5] Ibid. § 14. [6] 35 & 36 Vic. c. 77, § 4. [7] Ibid. § 5. [8] Ibid. § 7. [9] 30 & 31 Vic. c. 130. [10] 38 & 39 Vic. c. 70. [11] 27 & 28 Vic. c. 37, § 6.

the time of the work done.[1] And if any chimney sweep compel, or knowingly allow, any young person under twenty-one to ascend or descend a chimney, or enter a flue to clean it, or to extinguish the fire, such chimney sweep incurs a penalty of ten pounds.[2]

Liability for maintenance of children.—The liability for the maintenance of children as between parent and child, has already been sufficiently noticed under the chapter as to "Poor." It is true, what is there stated has reference more immediately to children of those poor parents, who are either themselves paupers, or who abscond and desert the children, and leave the latter to be burdens on the parish. There are, indeed, other questions relating to the maintenance of legitimate children by their parents, having no reference to pauperism; and the extent to which a parent is bound, directly or indirectly, to pay the debts incurred for necessaries of the child. But these latter questions arise directly out of the subject of marriage, and must be stated in their proper place, when the "Security of Marriage," one of the main divisions of the law, comes to be treated of. It is enough here to make this passing allusion to the place where that matter falls to be disposed of.

Maintenance of bastard children.—The remark that the law as to the maintenance of legitimate children, belongs to and flows out of that division of law intituled "marriage," has no application to the case of illegitimate children, for these have nothing to do with marriage. It is one of the singular doctrines of the law, that illegitimate children, have no parents and no relatives, and therefore can have no claim for maintenance on anybody. The consequence inevitably follows, that they must utterly perish, for in the helplessness of infancy they can neither support themselves, nor can they resort to the workhouse as the only other alternative. Parliament has accordingly been obliged to invent a circuitous machinery, whereby an illegitimate child, though in the eye of the law nobody's child, is yet to a great extent put under the charge of the natural mother, who is punishable for deserting it; and as a help towards the maintenance of the child, she may, by another circuitous proceeding, called an affiliation order,

[1] 27 & 28 Vic. c. 37, § 7. [2] 3 & 4 Vic. c. 85, § 2; 27 & 28 Vic. c. 37, § 11.

call on the natural or putative father to make some contribution towards its support. By these two supplementary processes, the condition of a bastard child is restored so far, that it is to some extent secured against starvation, and thus put on a footing, not very different in that respect, from the case of a legitimate child. In other collateral matters, however, as will be seen, its condition and status are still very different from those of a legitimate child, and in fact these two never can stand on an entire equality. Rightly or wrongly, such is the view held by the law: in all that respects property, a bastard never can be on an equality with a legitimate child, though as regards personal maintenance, it is not so far behind, at least till it attain the age of sixteen.

The rule of law, that the relation of parent and child does not exist in the case of a bastard, is seen most signally as regards the parents' property. A bastard is to this day, as will be hereafter explained, not allowed to inherit lands of his parent. The doctrine of the canon law, which relaxed that rule in case of the father and mother being afterwards married, was repudiated by the Statute of Merton.[1] The same rule was extended to Wales shortly afterwards.[2] A like rule is applicable to the personal estate of the parent. The child cannot succeed to any part of it according to law; and even in the case of the parents leaving a will, various technical rules exclude the bastard from the benefit of it, unless he is individually named as a legatee. These particulars, however, belong to the division of the law intituled "Property." Though both parents of a bastard in England are bound by statute, and by statute only, to support the bastard child, there is no obligation in any event on the bastard to support the parent; for, as already stated, the statute of Elizabeth imposed no such obligation by the poor law, and in the eye of the common law he is no child of theirs. This result agrees, indeed, with the law of Solon, which relieved a bastard from the obligation of maintaining his parents, as a just retaliation for their disregard of the married state.[3]

Children of married women when bastards.—A bastard child, then, is a child which has not been born in lawful

[1] 20 Hen. III. c. 9. [2] 12 Ed. I. c. 13. [3] Plut. Solon.

wedlock, or what is called during a legal marriage. The laws of all civilised countries usually prescribe, over and above consent and contract, certain formalities, by the observance of which two persons of opposite sexes become recognised as legally married, and by the non-observance of which they are recognised as not married; and as a further consequence, any child which the persons who are not married may have is not in the eye of the law their child at all. The child is said to have a natural father and mother, but not a lawful father and mother. And yet a married woman may be the mother of a bastard child. One of the first difficulties thus is to ascertain when a child is or is not illegitimate, for though marriage is usually easily proved, yet there is a further fact required when a married woman gives birth to a child, of which her husband disowns the paternity. When he is allowed to prove this want of paternity, in proof of such repudiation, there is a presumption, but it is a presumption and nothing more, that the child of a married woman is deemed to be the child of her husband until the contrary is proved. Varro says, a people called the Psylli, in order to test whether a child was legitimate, applied a bite of a venomous serpent, and if the child survived it was deemed unquestionably legitimate.[1] Courts often resort to singular modes of evidence, and lay down hard and fast lines as to this presumption. Our own courts in ancient times seem to have not known where to stop in applying such presumption, for it was held by the judges of Edward I., that, though the husband had been beyond the seas for three years, and the child was born just before his return, yet the presumption of legitimacy was not rebutted, because it was said, "the privacies of man and wife cannot be known."[2] But in modern times we are not so much led away by a rule as not to know, when it can, and when it cannot, be made to apply to the circumstances of a particular case. It is true, there is a secondary rule founded on public policy or morality, namely, that when two married persons are living together, neither of them is directly or indirectly to be heard to give evidence, that the child is not the

[1] Plut. Cato (n).

[2] Year Book, 32 Ed. I. 62.

husband's, otherwise great frauds and injustice may result.[1] But nevertheless the evidence of third parties, supported by facts, may demonstrate clearly, that, owing either to the absence of the husband abroad, or to his living apart, or non-access, or other strong circumstances, he was not in fact the father of the child; and consequently in that case the child will be deemed not legitimate.[2] It is not at all necessary to prove impossibility of the husband's access to the wife at the commencement of the usual time of gestation, but only such strong improbability of such fact as satisfies reasonable minds or a jury.[3]

When it becomes important for a person who is supposed to be a bastard, to establish by evidence that he or she is not a bastard, but a legitimate child of the parents, this fact may be established by a direct procedure called a petition for a declaration of legitimacy, under the Legitimacy Declaration Act of 1858.[4]

Mother's liability for maintenance of bastard child.—There can seldom be a difficulty as to who is the mother of a bastard child, and leaving for the present out of the question, whether the paternity is capable of being ascertained or not, the moment it is established, or it is admitted, that a woman has a bastard child, the statute law fixes at once upon her the duty of maintaining that child; she is in that respect nearly in the position of the lawful mother, when that mother is a widow. If she neglect to maintain the child, being able to do so, and so the child becomes chargeable to the union or parish, she may be punished under the Vagrant Act, as an idle and disorderly person, with three months' imprisonment.[5] This liability of the mother continues till the child attains the age of sixteen; but if she marries before that time, then whoever marries her is himself fixed with the liability of maintaining such bastard child as part of his family, till the same age, or till the mother's death.[6] But though the mother, when alive, is bound to maintain her bastard child, if under the age mentioned, yet if the mother die, leaving

[1] Goodwright *v* Moss, 2 Cowp. 594; R. *v* Mansfield, 1 Q. B. 444.
[2] Yates *v* Chippendale, 11 C. B., N. S. 542. [3] Gurney *v* Gurney, 32 L. J., Ch. 456; Re Saye and Sele, 1 H. L. C. 507. [4] 21 & 22 Vic. c. 93. [5] 7 & 8 Vic. c. 101, § 6. [6] 4 & 5 Will. IV. c. 76, §§ 57, 71.

property, her executors are not bound in any way to continue this maintenance out of her estate.[1]

Fluctuation of law as to maintenance of bastards.—The law has fluctuated much on the question, who should maintain a bastard child—whether the mother alone or the father alone, or both jointly—and next as to the most satisfactory way of discovering who is the putative father, and as to what court should be charged with that inquiry. Before the Poor Law Amendment Act of 1834, Lord Brougham said, the burden of maintenance of the child was thrown on the father, and the woman had no interest in avoiding incontinency; but after that date it was mainly her interest and her risk.[2] The old Welsh laws also compelled the father to maintain the child wholly; and the mother's oath to the priest as to paternity was deemed quite conclusive.[3] Before a regular poor law existed in England, it was deemed right, that parishes ought to be relieved of the maintenance of bastards; and justices were to inquire who were the reputed parents, so that the parish might be reimbursed, otherwise these parents were to be imprisoned.[4] Thus both parents were subject to some liability. A little later, a lewd woman, having a bastard, was imprisoned in the house of correction with hard labour for a year; and on a second offence she was to be kept there till she found a surety not to offend again.[5] The goods and rents of the runaway putative parents might also be seized in payment by the churchwardens and overseers.[6]

How far putative father is liable for maintenance of bastard child.—At last the conclusion arrived at was, as already mentioned, to make the mother of a bastard the parent primarily liable for its maintenance, till the child attained the age of sixteen. If she choose herself to undertake this entire maintenance, then the putative father

[1] Ruttinger v Temple, 4 B. & S. 491. [2] 25 Parl. Deb. (3rd) 250. [3] Vened. Code, b. ii. c. 1, § 33; Gwent. Code, b. ii. c. 39. [4] 18 Eliz. c. 3, § 1. [5] 7 Jas. I. c. 4, § 7; 2 Inst. 733.

[6] 14 Ch. II. c. 12, § 19. In Iceland an unmarried woman with child, who refused to name her seducer, was put to moderate torture, so as not to break the skin. The object of this was to enable the family to get the fine, and save themselves the expense of maintaining the child. Yet if the mother confessed, additional evidence was required to convict the putative father.—*Grágás*, c. 32.

cannot be compelled by any third party in any way to disclose himself or to contribute. But an option is given to the mother, if she choose, within a limited time before or after the birth, to prove who is the putative father, and to obtain an order upon him to contribute to the maintenance a sum not exceeding five shillings per week. And this power does not depend on whether either parent is rich or poor. It is a power reserved exclusively for the benefit of the mother, if she choose to avail herself of it, and unless the child become chargeable to the union or parish, no third person can interfere to enforce the law: but when so chargeable, if the mother will not proceed to recover the above weekly sum against the putative father, then the union or parish may do so by way of reimbursing themselves part of the outlay in maintaining the child.[1]

How the mother of a bastard proceeds against the father.—It is thus in the option of the mother of a bastard child, and of her alone, to proceed against the father, except where the child becomes a burden to the parish or union. The mother in proceeding to vindicate her right may, either before or within twelve months after the birth of the child, go before a justice of the peace of the petty sessional division within which she resides, and on oath state who is the father; and after summoning the putative father, if her oath is corroborated, the justices may adjudge such person to be the putative father, and to pay certain sums towards the maintenance and education of the child.[2] And so essential is the mother as a witness in this procedure, that if she die after the summons has issued, but before the hearing, the jurisdiction of the justices is gone, and the matter must drop.[3] Not only may the mother apply, as a matter of course, within twelve months after the birth of the child, but she may apply at any time afterwards, provided she is able to prove, that within such twelve months the putative father had paid money for the child's maintenance, or if he should have left England after the child's birth, then that she made the application within twelve months after his return. If the woman fulfil these conditions, she can set in motion this process against the

[1] 7 & 8 Vic. c. 101; 8 & 9 Vic. c. 10; 35 & 36 Vic. c. 65; 36 Vic. c. 9. [2] 36 & 37 Vic. c. 9; 35 & 36 Vic. c. 65. [3] R. v Armitage. L. R., 7 Q. B. 773.

putative father, who is thereupon served with the summons either personally or by its being left at his last place of abode.[1] But in general it will be too late, if she allow twelve months to elapse after the birth without taking her first step. In these inquiries it is not unusual for the alleged putative father, as part of his defence, to prove that the mother was acquainted with another man, who might be the father; and if it is suggested, that another man, specified by name, had connection with her before the birth of the child and at a time when he may have been the father, and she deny the fact, such man may be called as a witness to prove the fact, and thereby contradict her. And this contradiction may be fatal to her success.[2]

The jurisdiction of justices in deciding bastardy cases.— The proceedings in bastardy are wholly taken before justices of the peace in a summary manner. The justices can issue a summons upon the mother's oath, requiring the alleged putative father to attend; and if he will not attend, they can proceed in his absence to decide on the application. If he do attend—and if the mother choose, she can enforce his attendance—then he is entitled to give evidence as a witness. One essential point is, that the mother's oath as to the paternity shall be corroborated in some material particular by some third party, and which particular may consist in any kind of conduct prior to or after the birth, from which the paternity may be inferred.[3] The father may be ordered to pay the weekly sum of five shillings till the child attain the age of sixteen, and also the expense incidental to the birth of the child; and if he is dissatisfied, he may appeal against the order to quarter sessions. If he fail at any time for a month to pay the weekly sum, he may be arrested and brought before the justices; and, if he still refuse, his goods may be seized to pay the sum due, and failing payment in that way, then he may be committed to gaol for three months.[4] The putative father's right to appeal to quarter sessions is usually the only way in which he can question the adjudication of justices. And the decision of quarter sessions is final, for, though in many cases if the mother has failed to serve him with a

[1] 35 & 36 Vic. c. 65. [2] Garbutt v Simpson, 32 L. J., M. C. 186.
[3] 35 & 36 Vic. c. 65, § 4. [4] Ibid.

summons, owing to his keeping out of the way, she can issue the summons at any time on his again returning within the jurisdiction, yet, if there has been an appeal, and the mother's case fails for want of corroborative evidence, the decision of quarter sessions entirely concludes the matter.[1]

Guardians of union or parish may enforce contribution from putative father of bastard.—Such is the usual course of the proceeding by the mother of a bastard to enforce from the putative father a contribution towards the child's maintenance and education. But if she refuse or neglect to proceed against him, and the child become chargeable to the parish, then the guardians may, in order to recoup themselves, take the same kind of proceeding against the father, though labouring under considerable disadvantage as regards the means of proof. This application on their part need not be made, like the mother's, within a limited time after the birth of the child, but may be made at any time while the child is liable and under the age of sixteen, and they may recover a like sum with costs against the father as the mother herself could have done in her own right.[2]

Right to custody of a bastard child.—As the law throws the burden of the maintenance of a bastard child exclusively on the mother, with a power to enforce a contribution against the putative father, it follows that she should have the right to the exclusive custody of such child as against the father till the child attain the age of sixteen. After that age, the child cannot be controlled in any way against his or her consent.

Cruelty to young children when nursed for hire.—Though, as already stated, ill-treatment of children is guarded against by the remedies for assault or for murder and manslaughter previously described, and its maintenance may be secured under the poor law and the vagrant laws, yet there is one form of treatment which often gives rise to maltreatment and loss of life; and that is, where the child is sent out to nurse, and is under the hands of hirelings, as is often the case with illegitimate children. Here also the watchful eye of the legislature has added a further security in favour of life. Whenever a person, not being

[1] R. v Glynne, L. R., 7 Q. B. 16. [2] 36 Vic. c. 9, § 5; 39 & 40 Vic. c. 61, § 24.

a relative, receives for hire or reward more than one infant under the age of one year for the purpose of nursing or maintaining them apart from the parent, this house must be registered by certain local authorities, and the registered person must keep a record of the name, age, and sex of the child, and other particulars, and must, within twenty-four hours after the death of any such infant, give notice to the coroner. Every person offending against the act may be imprisoned for six months. In this way checks are provided against cruelty and maltreatment of children during that tender age.[1]

Children suing for personal injuries.—In all descriptions of personal injuries to children, for which adults, if injured in like manner, may sue, a child may sue and recover damages. It is true, that the practice of the court requires, that such an action must be in the name of a next friend or guardian, but this being mere matter of procedure, the essential right of action is not otherwise affected. And where a father is killed by negligence, it has already been stated in what circumstances, and who can sue on behalf of a child.[2] And for like reasons a child may, as well as an adult, apply for articles of the peace against any person who threatens personal violence.

Children as witnesses.—The compulsory duties of children are necessarily few, on account of their age and defective understanding. But, as has already been stated, the duty of giving evidence in courts of law being necessary for the administration of justice, in this one particular of being witnesses, children differ in no other respect from adults, than in the intelligence requisite to enable them to describe what they have seen. It is obvious, that there must be a degree of intelligence to enable this function to be exercised in a trustworthy manner. And as there is no precise age, at which either wisdom or intelligence comes, it is left to the discretion of the judge, in a great measure, to decide for himself, whether the child's intelligence is sufficient at any given moment. Thus there is no rule to prevent a child under seven, to be allowed to testify, if the appearance of intelligence is satisfactory, and children

[1] 35 & 36 Vic. c. 38.

[2] See *ante*, Chap. ii.

of five and six seem to have been accepted as witnesses.[1] Hale said, that he had known a case of witchcraft, where a child of nine had been admitted as witness against his own mother. But one of the sanctions, which in the case of adults is required to keep a witness right, is the solemnity of an oath; and it is here that the difficulty in admitting children as witnesses often arises. A child may have no definite notion, why truth is either necessary or desirable, whether in a court of justice or elsewhere, and yet may instinctively state the truth notwithstanding. But a judge usually tries to discover that a child has either been taught or has come to know, that it is wrong to speak falsely; and when there is a glimmering of this sentiment, then the evidence is at once received. One judge was quite satisfied with the capacity of a girl of six, who told him she said her prayers, thought it wrong to tell lies, or who by way of answer said, it was a bad thing to tell a lie.[2] But since oaths have been, to a great extent, allowed to be superseded by a solemn declaration, the same strictness with which this practice has hitherto been pursued in the case of children may be relaxed also, seeing that it is almost an instinctive tendency of children to speak the truth, especially when left to themselves, and when without fear of immediate consequences.[3] But it seems a questionable practice to postpone a trial, in order that a child may be educated in the meaning and effect of oaths; for this tends to distort the evidence, and detract from the reliability of the first impressions. Nevertheless this was once done in 1795, by Justice Rooke, who, when a little girl was brought forward as a witness in a criminal prosecution, postponed the trial to next assizes to allow a clergyman to instruct her in this subject; and some of the other judges of that day were said to approve of that course.[4] But this will probably seldom be done, unless the party affected by such evidence has the benefit of comparing the two accounts, given by the child before and after this course of enlightenment.

The registration of the births of children.—There is one incident attending the birth of every child, which the

[1] R. *v* Brasier, 1 Leach, 199; R. *v* Perkin, 2 Mood. C. C. 139.
[2] R. *v* Holmes, 2 F. & F. 788. [3] 33 & 34 Vic. c. 49, § 1. [4] R. *v* White, 1 Leach, 430.

child cannot indeed attend to, but which the parents and guardians are compelled to attend to on its behalf, though this is, strictly speaking, not a matter which causes or prevents pain to the body of the child. Yet it is so peculiarly personal to the child, that it falls naturally to be noticed in this place, and that is the duty of third parties, who are usually the parents of the child, to register the name and age of such child. This duty is imposed on all parents whatsoever, for various motives of utility connected with the health and general well-being of the community. Statistics of this kind enable any reasoning as to the benefit or mischief of particular laws to be much more satisfactorily carried out than it would otherwise be.

The practice of registering births seems not to be entirely a modern idea, though the perfection of its details is so. The Incas of Peru made it a fundamental rule of their government, that all the inhabitants of their towns should be numbered and registered,[1] and their births and deaths recorded, and how many went to the wars, and what became of them.[2] And in China, as it was said, that all the taxes were poll taxes, the birth of each male child was registered, since he was required to pay taxes at eighteen.[3] In Rome the births and deaths were duly registered. The foolish curiosity of Eligabalus attempted to discover from the quantity of spiders' webs, the number of the inhabitants; but no writer of antiquity sums up the numbers.[4] As a general rule, the ancients had no appreciation of the value of statistics; and hence their information on many interesting points has been of little value to their successors.

The early statistics in this country were chiefly connected with the practice of baptism. And the laws of King Ine made it compulsory to baptise children within thirty days, otherwise the parents had to pay a large fine.[5] In the time of Henry VIII. the first injunction was issued to the clergy to keep a register book and write therein the weddings, christenings, and burials.[6] And penalties were imposed on the parson for neglect of this duty during that and the next two reigns. In 1597 a constitution of

[1] Com. of Incas, b. ii. cc. 11, 14. [2] Ibid. b. vi. c. 9. [3] 7 Pink. Voy. 193. [4] Gibbon, Rom. Emp. c. 31. [5] Anc. Laws, K. Ine, 2. [6] 30 Hen. VIII. (1538).

the Province of Canterbury obtained the approval of the queen, enjoining careful preservation of the registers, and one of the canons, ratified by James I. (canon 70), confirmed this duty. In 1695 a penalty was imposed on parents for not giving notice to the clergyman of a birth.[1] And in 1812 the duty of the clergy was facilitated by books and forms being provided at the public expense, and a statute punished their defacement or destruction.[2] Most of the parish registers had great defects; and it was not till 1836, that a systematic attempt was made to create a suitable machinery for registering the whole births, marriages, and deaths in the kingdom.[3]

Machinery for registration of births.—For the purpose of registration of births, England is divided into districts, which are usually parishes or divisions of parishes.[4] The guardians of the parish or union are bound to find a suitable building for the registrar's office. They also appoint and pay the registrars according to a scale varying with the amount of work done. But the Registrar-General supplies the books and forms at the expense of the Consolidated Fund. The registrar is liable to a penalty of fifty pounds for refusing or omitting, without reasonable cause, to register a birth.[5]

Punishment for not registering child's birth.—The mode in which the compulsory registration of births proceeds is by imposing a penalty, in certain circumstances, on the parents, and in their default on the occupier of the house, or any one present at the birth, or the person having charge of the child. One or other of these parties is subject to the duty of giving, within forty-two days after the birth, information of the particulars to the registrar, and to sign the register in his presence.[6] And if after forty-two days from the birth, the parents have failed to give the information, the registrar may demand in writing such information from any of the other parties.[7] The duty is also imposed on any one, who finds a new-born child, to give like information to the registrar.[8] If the requisite particulars are

[1] 7 & 8 Will. III. c. 35. [2] 52 Geo. III. c. 146.

[3] 6 & 7 Will. IV. c. 86; 37 & 38 Vic. c. 88. The system of registration was extended to Scotland in 1854, and to Ireland in 1863.

[4] 6 & 7 Will. IV. c. 86, § 7: 37 & 38 Vic. c. 88, § 21. [5] Ibid.; 37 & 38 Vic. c. 88, § 35. [6] Ibid. § 1. [7] Ibid. § 2. [8] Ibid. § 3.

given to the registrar within three months after the birth, then no fee is payable to him.[1] But after that time, and within twelve months, the registrar is not to receive the information, except upon a solemn declaration to the best of the declarant's knowledge and belief; and a fee is then payable.[2] After twelve months from the birth, the registrar is not to register the birth except with the written authority of the Registrar-General, on which occasion a higher fee is necessary.[3] And in the case of an illegitimate child, the duty of registering the birth is imposed on the mother only; and no person is to be entered in the register as the father, unless he attend with the mother and acknowledge the paternity, and also sign the register.[4] And where a birth occurs at sea, the captain or master is bound, under a penalty of five pounds, to record the fact in his log-book, adding the father and mother's name, nationality, and place of abode; and this return is sent to the Registrar-General of Shipping and Seamen, or other like officer, on the ship arriving in any port within the United Kingdom.[5]

As everything depends on the parents and other persons (whose duty it is declared to be) giving the correct information, a penalty is imposed on each such person who wilfully refuses to answer any question put to him by the registrar. This penalty is forty shillings, and on non-payment the person may be imprisoned for a calendar month.[6] Such a punishment is incurred not merely by neglecting the duty of sending the information in the first instance, but it is incurred at a later stage for refusing to give the information, when the registrar has made the proper demand for it.

Punishment for falsifying registers of births.—Every person who makes a false answer to, or wilfully misinforms the registrar, or wilfully makes a false declaration, or makes any false statement with intent to have the same entered in any register of births, is liable to a penalty of

[1] 37 & 38 Vic. c. 88, § 4.

[2] Ibid. § 5. The fee is 2*s*. 6*d*. each to the registrar and superintendent registrar.—Sched. If the informant has removed into another district before registration, he must pay a fee, though within three months after birth.—37 & 38 Vic. c. 88, § 6.

[3] 37 & 38 Vic. c. 88, § 5. The fee is ten shillings.—Sched. All fees are recoverable as debts.—37 & 38 Vic. c. 88, § 27.

[4] 37 & 38 Vic. c. 88, § 7. [5] Ibid. § 37. [6] Ibid. §§ 39, 45.

ten pounds, or, on indictment, to be fined or imprisoned for two years, if a justice of the peace think he ought to be indicted.[1] And whoever shall destroy, deface, or injure unlawfully any register, or forge, or alter any entry as to birth, or any certified copy of such register, or shall wilfully cause to be inserted in the register any false entry of any matter relating to a birth, or shall knowingly utter or put off a false entry, shall be guilty of felony, and may be sentenced to five years' penal servitude, or two years' imprisonment with hard labour and solitary confinement.[2]

Right of search of register of births.—The entries of births are collected from the various registrars, and sent to the Registrar-General for preservation and for indexes. The registrar is bound to allow a search of his register to be made, and to give a certified copy for a small fee.[3] Any certified copy given out of, and bearing the seal of the office, shall be received as evidence of the birth, without any further or other proof of the entry; but the seal or stamp is essential to such copy.[4] And it has been held that the entry in the register is evidence of the birth having taken place before the registration, but not of the exact date of birth.[5] A certified copy of a birth, moreover, shall not be evidence of the birth, unless the entry purports to be signed by the proper informant, or with the proper authority.[6]

Compulsory education of children.—We come now to a compulsory process with reference to children, which is wholly peculiar to them, and is in no way applicable to adults. This is the practice of compelling them to be educated, or in other words, compelling the parents and guardians to see this done. We have seen, that the moment a child is born, and even before that event, the law comes to its assistance, guarding with the whole *posse comitatus* its fragile life from every species of wrong that the ignorance, folly, neglect, wickedness, or violence of others, or even of its own parents, may cause to it. But all this care and vigilance is expended merely on the preservation of the body. How much more, it may be said, should the law enforce and secure equal care to

[1] 37 & 38 Vic. c. 88, §§ 40, 45. [2] 24 & 25 Vic. c. 98, § 36. [3] 6 & 7 Will. IV. c. 86, § 35. [4] Ibid. § 38. [5] Re Wintle, L. R., 9 Eq. 373. [6] 37 & 38 Vic. c. 88, § 38.

protect those moral and intellectual qualities, which are still more essential to the growth of such child, and most of all essential to its better life, when that body is arrived at maturity. Yet, strange to say, this duty has been the discovery only of very recent times. Though it has been known and familiar to mankind from the beginning of time, that the mind as well as the body of children must be educated, in order to attain any great, or even moderate perfection in any one kind of knowledge or power, yet the law had left this duty entirely out of the list of things to be attended to. Though it has for centuries been acknowledged, that the child is neither the slave nor the chattel of its parents, and that a parent is little more than its nearest neighbour, yet no care whatever was taken to see that its education was carried out by this neighbour even in the most moderate degree. It was silently assumed against the clearest light, that it would be an undue interference with some supposed natural liberty of parents, if they were to be restrained in this particular. And while the law has been for centuries building its gaols higher and stronger, multiplying police and increasing judges and courts, hanging and burning felons for the most frivolous causes, beheading and quartering traitors, it never occurred to the legislature to begin a little nearer to the beginning, in order to intercept the main spring of all this inundation, and so save a large proportion of the later troubles inevitably brought after it. Each human being, left to grow up wild, uncared-for, untrained, and unaccustomed to self-restraint, is like a fiery and combustible missile thrown into the crowd, and no man can tell whose eye will be first put out by it, and how many other eyes will follow. Even the ancients saw the force and appreciated the necessity of looking into the early training of children; and though their main object was to train them to be fighting animals, for the purpose of subduing enemies, rather than of subduing themselves, we have at last been obliged, after centuries of misplaced apathy, timidity, and many false and confused notions of liberty, to be brought round at last to imitate the Spartans. It is true that their notion of liberty was merely to fight and plunder their enemies, assassinate their redundant slaves, and despise trade and the science that it leads to, while

we look rather to train the infant mind, mainly in order that, when matured, the same mind may shine more brightly in the full possession of self-acquired virtues and under self-imposed restraints. We treat all labour as honourable, and the more honourable the less it interferes with the occupations of others. We aspire to give a larger and wider scope to our liberties, simply because we are not ashamed to be put under restrictions, but rather welcome and seek after them, whenever such restrictions are seen to be necessary to advance the general good. For as was shown in a former chapter, liberty is only a restriction put on at the right place. And no restriction put on human conduct was ever more clearly calculated to attain a definite good than that put upon parents and guardians, in order to compel them to think a little, and take a little trouble, about the education of children.

The ancients on compulsory education.—In Athens, Solon ordered that all the children should be educated, and all should be taught to swim.[1] The Spartans had the children educated in public, and taken altogether out of the parents' management, being treated as children of the state rather than as children of the parents.[2] Constantine ordered that all children of parents too poor to maintain them should be educated as well as fed.[3] The Carthaginians, it is true, once made a law, that none should learn Greek; but this was because they supposed that language was resorted to for treasonable purposes, and it was a law which was soon neglected. The Incas of Peru had a maxim of government, that the children of the common people should not learn the sciences, which should be known only by the nobles, lest the lower classes should become proud, and endanger the commonwealth.[4] Nevertheless it was also their law, that every child should be taught the common arts necessary to maintain human life.[5] And in China all poor children were taught, and masters found for them at the public expense.[6] Xenophon praised the Persians for the great care they took in educating their children, so as to prevent the commission of crime, for this was much better than punishing them after crimes

[1] 1 Potter, Gr. Ant. 26. [2] Plut. Lycurg. [3] Cod. Theod. b. ii. lib. 27, § 1. [4] Com. of Incas, b. iv. c. 19. [5] Ibid. b. v. c. 9. [6] 7 Pink. Voy. 193.

were committed.[1] And Minos of Crete took heed that all the children should be educated, not forgetting the Pyrrhic dance.[2] The feudal and slavish notions of modern countries for many centuries seem to have been adverse to all kinds of education among the lower classes. And in the time of Richard II. the barons petitioned the king, that no villein should be allowed to send his son to school.[3]

How education of children enforced.—Though it requires only a few words to say, that all children shall be educated, if not voluntarily, then compulsorily, yet the mode of practically accomplishing this object involves an elaborate machinery resembling in some respects that which is required in order to give effect to the simple declaration, that no person shall be starved to death. The poor laws are designed to provide a mode of securing all persons against starvation; and in like manner the education laws provide against any children being allowed to grow up in utter ignorance.

To carry out the principle of enforcing education of all children, it was necessary to divide all England and Wales into districts, to provide for the election of a school board in nearly every district, the members of such school board consisting of volunteers, who should act gratuitously. These boards required to have the necessary powers for levying rates, or otherwise procuring funds, in order to provide schoolhouses and teachers and enforce the attendance of children. When these last three essentials were secured, a sufficient number of competent volunteer members might be relied on to take part in the supervision of the practical details. It was still further necessary to provide for some central authority placed over all the district boards, in order to settle conclusively the kind and quality of the education that was to be taught, so as to secure uniformity and equal advantages at the hands of the state to all the children in the land. When once the legislature enacts, that all children, whether rich or poor, shall be educated, what is obviously meant is, that children shall receive a *minimum* of education, leaving it for themselves or their parents to add to it thereafter as they may be disposed.

[1] Xen. Cyrop. [2] Strabo, b. 10. [3] 3 Brady, Hist. 393; Barringt. Stat. 300.

To decide what that *minimum* should be, is best left to the central authority. But what is important is, that the object in view, namely, universal education, shall be secured at all hazards, all other details being merely the means of securing that result. The machinery may be altered and improved from time to time, as it is likely to be; but the result must in the meantime, if possible, be attained. And though ignorance, even irrespective of legal obligation, is seldom allowed to prevail among the children of the rich, yet as the rich and prosperous have sometimes the incredible folly of wholly neglecting their children's education, it is essential that the law should be absolute, and that this national requirement should visit with impartial care the mansion as well as the cottage. Education and its counterpart, vice, are the great levellers; and there is no reason for drawing any distinction in this respect between classes and conditions.

Machinery for providing schools.—The central board, which is the animating principle in national education and the universal referee of the district boards as to details of management, is the Privy Council in its educational department. This board has to determine, whether the public school accommodation in a district is sufficient, and declare the extent to which it considers further accommodation requisite;[1] but the parties interested as ratepayers are allowed to object and complain.[2] The education department directs a school board to be formed as well as the manner of electing it,[3] the expense being paid out of the school fund. But if the school board be in default, then the department may itself appoint certain persons by name to act provisionally until the proper machinery is forthcoming.[4] The division of England and Wales into school districts followed the existing divisions into boroughs, local sanitary districts, and parishes; an exception being however made in respect to the metropolis, which forms a separate district of itself, embracing all the various parishes and unions within that large area, and extending also to the suburban parishes.[5]

Election of school board.—The manner in which a school

[1] 33 & 34 Vic. c. 75, § 8. [2] Ibid. § 9. [3] 33 & 34 Vic. c. 75, § 10; 36 & 37 Vic. c. 86, sched. 2. [4] 33 & 34 Vic. c. 75, § 63. [5] Ibid. § 75, sched.

board is elected is as follows. In a borough all the burgesses, and in a parish all the ratepayers, are entitled to vote. Each may give a number of votes equal to the number of members to be elected, or may give the whole of his votes to one member, or may distribute them as the voter thinks proper among a few candidates.[1] At the taking of the poll, the voting is by ballot.[2] The number of members of the board varies from five to fifteen, as the central board may order or approve.[3] Unmarried women, who are ratepayers, may vote, except in the city of London; and women, whether married or not, may be members of the board.[4] The office of member of the board is entirely gratuitous, except that in the London school board the chairman may receive a salary. Any person may be elected a member of a school board, there being no qualification required either in point of property or residence. But if he accepts a contract or is interested in any bargain with the board, he vacates his seat.[5] And in like manner he vacates his seat, if he absent himself for six successive months from all meetings of the board, except from temporary illness or other cause approved by the board; so if he is imprisoned for any crime, or if he compounds with his creditors.[6] The election of members is for three years.[7]

Though reliance is placed by the legislature on volunteers coming forward to act as members of a school board, yet care is taken that they shall be elected fairly. While the machinery of the ballot is applied, when there is a competition between several candidates, all corrupt practices are punishable. Every person obstructing an election, or contravening the regulations of the education department, incurs a penalty of fifty pounds.[8] And any person, guilty of corrupt practices, is liable to a penalty, and to disqualification from voting for six years, not only at elections of school boards, but also at any parliamentary or municipal election.[9] And so stringent is this law, that

[1] 33 & 34 Vic. c. 75, § 29. [2] 36 & 37 Vic. c. 86, sch. 2; 35 & 36 Vic. c. 33. [3] 33 & 34 Vic. c. 75, § 31. [4] Ibid. §§ 29, 3, 37; 32 & 33 Vic. c. 55, § 9. [5] 33 & 34 Vic. c. 75, § 34. [6] Ibid. sch. 2. [7] Ibid. [8] Ibid. § 91.

[9] 33 & 34 Vic. c. 75, § 91. Corrupt practices mean such as are defined in reference to elections of members of Parliament.—Ibid. 17 & 18 Vic. c. 102.

a candidate will incur this penalty even by giving trifling refreshments to voters, whenever any connection can be established between such liberality and some future election.[1]

Duties and funds of school board—The main duty of a school board, when elected, is to provide school accommodation, subject to the correction of the central authority. For this purpose the board may acquire compulsorily suitable ground for a school, and borrow money wherewith to build a school, from the Public Works Loan Commissioners, which money is to be repaid gradually within fifty years.[2] The school fees of some advanced children may be paid out of the moneys provided by parliament, and annual grants to elementary schools are made under certain conditions.[3] The school fees paid by scholars are the main contribution to the school fund, while out of such fund must be paid the necessary expenses incurred by the board, and the salaries of officers.[4] But the school board may in cases of general poverty of a neighbourhood dispense with school fees altogether.[5] The expense of the election and polling of voters, being part of the machinery, is also defrayed from the same source.[6] The deficiency in the school fund to meet these expenses is made up by contributions from the poor rates of the parish, or borough fund, or similar local rate, for which purpose the school board issues a precept stating the amount required in the circumstances.[7]

Compelling attendance of children at school.—However excellent may be the provision for the education of children, all this expense of schools and teachers may be wholly thrown away, if there be no means of compelling the attendance of such children. A child of so tender an age, as that between five and fourteen, being usually under the care of parents or guardians, it is only possible to effect this compulsion by imposing some penalty on the parent, who neglects to see that such children do attend a school. The age of compulsory education is from five

[1] Turnbull *v* Welland, 24 L. T., N. S. 730. [2] 36 & 37 Vic. c. 86, 10. [3] 39 & 40 Vic. c. 79, §§ 18, 19. [4] 33 & 34 Vic. c. 75, 53. [5] Ibid. § 26. [6] 36 & 37 Vic. c. 75, § 2. [7] 33 & 34 ic. c. 75, § 54.

to fourteen.[1] The mode in which children are compelled to attend school is as follows. It is the duty of a parent to cause his child to receive elementary instruction in reading, writing, and arithmetic. To ensure performance of this duty, all persons, parents included, are liable to a penalty for taking into their employment any child under the age of ten, subject to some exception as to harvest work, and children two miles from a school, or otherwise well educated.[2] If a child between ten and thirteen is taken into employment, he must be shown to be receiving education, or to have already received it. A school board or a school attendance committee see, that no child is employed who is not educated. If a parent is too poor to pay the school fees, he may apply to the guardians of the poor to pay such fees; and the parent does not come within the category of a pauper on this account.[3] But any fraud in obtaining such assistance is punishable.[4] A child above five requires to be sent to school; and if not so, the local authorities may apply to justices to order the child's attendance. If the parent still neglect, the justices may order the child to be sent to an industrial school, and the parent, if able, is ordered to contribute a small sum towards such school.[5] In the case of outdoor paupers, whose children are of an age to go to school, it is a condition of such relief, that the children be sent to school; and the parent may select the school, so long as the ordinary fees only are payable; and the guardians are authorised to pay such fees.[6]

How far religion is taught in elementary schools.—Though it might appear that there cannot be much difficulty in settling what are the elements of knowledge, which should be taught to the children attending schools which are supported out of the parochial and district rates, yet in one respect much difficulty was experienced by the legislature; and it must continue to be so, while the opinions of large classes of citizens, so nearly equal in political power and social distinction, are divided as to certain fundamental principles of policy which ought to regulate the distribution and application of funds collected from all classes of inhabitants. The religious element of education in public elementary schools is dealt with in the following manner.

[1] 39 & 40 Vic. c. 79, § 48. [2] Ibid. §§ 5, 9. [3] Ibid. § 10.
[4] Ibid. § 37. [5] Ibid. § 16. [6] Ibid. § 40.

It shall not be a condition of admission to one of the schools, that the child shall attend or not attend any Sunday school or any place of religious worship, or any religious instruction, either in the same school or elsewhere. And should the public school routine include instruction in religious subjects, then such instruction shall not be compulsory, and shall be either at the beginning or end of the secular instruction, so that any children may with the least inconvenience absent themselves.[1] No religious catechism or religious formulary, which is distinctive of any particular denomination, shall be taught in the school.[2] And the school board shall not be competent to make any bye-law, which shall compel a child to attend any religious instruction.[3]

Keeping up standard of schools.—The mode in which public elementary schools are kept up to the standard of efficiency is through the influence brought to bear on them by the vigilance of the central board or the education department of the Privy Council. That department judges of the amount of school accommodation, which is adequate to the wants of the district,[4] and sets in motion the machinery to provide what is necessary. An annual report is made to parliament of the proceedings during each year.[5] The department also makes regulations defining the particulars of the education taught.[6] It also appoints inspectors, who may visit a public elementary school at any time, in order to test the efficiency of the mode of education.[7] And the teachers, appointed by the board, hold office during the pleasure of the board.[8] Over and above the public elementary schools, which are maintained out of the parochial rates, there are various schools which supply similar education to children, and conducted at the expense of self-constituted guardians; and though, without any views of profit, all the arrangements are voluntary as regards the attendance of children, still the government contributes to their support, according to the number of scholars.[9]

Industrial schools for reclaiming children.—Another kind of education is found for certain classes of children,

[1] 33 & 34 Vic. c. 75, § 7. [2] Ibid. § 14. [3] Ibid. § 74. [4] Ibid. § 8. [5] Ibid. § 100. [6] Ibid. § 7. [7] Ibid. § 7; Code of Ed. Dep. [8] 33 & 34 Vic. c. 75, § 35. [9] Ibid. § 90; Code of Education Dep.

partly voluntary and partly compulsory. Industrial schools are schools, which are used partly in aid of the workhouse and partly in aid of the gaol, for the reclamation of children found in circumstances which suggest the importance of keeping them away from either destination. And both the guardians of the poor and the prison authorities, and the imperial treasury, may contribute towards the support of such schools.[1] And a school board also may establish such a school.[2] But as these schools are mostly founded and managed by benevolent persons who act out of charity, and as they have limited accommodation, it is always optional in the managers to receive a child when proposed to be sent; and all the orders made by justices of the peace are subject to this option on their part.[3] The schools are intended only for children under the age of sixteen, and no child above that age can be detained in them except with his own consent in writing.[4] But no child can be arrested and sent to the school, who is above the age of fourteen, though he can be detained till the age of sixteen.[5] And it is an essential feature of such a school, that the child should be lodged, clothed, and fed, as well as taught, on the premises.[6] And some of them may be day industrial schools to educate and feed children only for the day.[7] The school must also be certified by the Secretary of State on the report of inspectors.[8]

Care of children begging and in bad company.—One class of children who may be compulsorily arrested and sent to an industrial school consists of those who are found destitute and in bad company. Thus, a child may be found begging or receiving alms, or going about for the purpose of begging; and whether the child offers things for sale is immaterial. There are also children found wandering and not having any home, or settled place of abode, or proper guardianship, or visible means of subsistence. Children may be found destitute being orphans, or whose surviving

[1] 29 & 30 Vic. c. 118, §§ 12-37. [2] 39 & 40 Vic. c. 79, § 15. [3] 29 & 30 Vic. c. 118, § 18. [4] Ibid. § 41. [5] Ibid. §§ 14-17. [6] Ibid. § 5. [7] 39 & 40 Vic. c. 79, § 16. [8] Ibid.; 29 & 30 Vic. c. 118, § 7; §§ 44-48.

In 1874 there were seventy-seven industrial schools, accommodating 8,000 children.—2 *Pike on Crime*, 485.

parent is in prison. Children may frequent the company of thieves. In all these cases any person whatever may take the child, if apparently under fourteen years of age, before two justices of the peace, who, on being satisfied as to the facts, may order the child to be sent to an industrial school.[1] And whenever a woman has been twice convicted of crime, any children of such woman under the age of fourteen, who may be under her care and control at the time of her second conviction, and who have no visible means of subsistence, or are without proper guardianship, may be at once, by order of two justices, sent to an industrial school.[2] In all cases where a child, apparently under the age of twelve, is charged before justices with an offence punishable by imprisonment or a less punishment, but has not been convicted of felony, the justices have power to order such child to be sent to an industrial school.[3] Another class of children sent to such schools consists of those above the age of five, whom justices, on a complaint, find not attending any school for education, and whom the parent neglects or refuses to educate under his own superintendence; and also such children of that age as are found habitually wandering and not under proper control, or found in bad company.[4]

Refractory children, how maintained at industrial school.—Some children prove so refractory as to defy the control of their parents, or the guardians of the poor, under whose care they are. In such cases, whenever a parent, step-parent, or guardian of a child, apparently under the age of fourteen years, satisfies two justices that he is unable to control the child, and desires that it may be sent to an industrial school, the justices have power to send such child.[5] Such parent or other person liable for the maintenance of the child does not however escape liability, for except the main cause be non-attendance at school, he is bound, if of sufficient ability, to contribute a sum of five shillings per week to the school.[6] The justices decide as to the ability of the parent, and the propriety of the order imposing payment.[7] When the parent is subjected to this

[1] 29 & 30 Vic. c. 118, § 14. [2] 34 & 35 Vic. c. 112, § 14. [3] 29 & 30 Vic. c. 118, § 15. [4] 39 & 40 Vic. c. 79, § 11. [5] 29 & 30 Vic. c. 118, § 16; 39 & 40 Vic. c. 79, § 12. [6] 29 & 30 Vic. c. 118, § 39; 39 & 40 Vic. c. 79, § 12. [7] Ibid. § 40.

order, if he does not make the payments, his goods may be distrained, or he may be committed to prison in default of such payment.[1] And in cases where the parent is unable to pay, he may obtain the means from the guardians of the union or parish.[2] Not only may refractory children of all classes be sent to or detained in industrial schools, but those who are living in workhouses or pauper schools may also be taken thence and sent to an industrial school, where the discipline is more efficient. This is so, whenever the child is under the age of fourteen, and is satisfactorily shown to the justices to be refractory, or to have a parent who is then undergoing punishment for crime.[3]

To send a child compulsorily to an industrial school would be idle, unless there were proper machinery for detaining the child there. Hence it is one of the implied conditions in all such cases, that the managers of the school shall, on receiving the child, undertake to teach, train, clothe, lodge, and feed the child while so detained.[4] If the child is above the age of ten, and wilfully refuses or neglects to conform to the rules of the school, he is liable, on complaint made to two justices, to be imprisoned for a period varying from fourteen days to three months; and after that period the justices may order the child to be next sent to a reformatory school.[5] The same punishment follows, if the child escape, or neglect to attend the school, unless it be deemed enough, that he should be apprehended without warrant, taken before justices, and ordered to be sent back to the school and detained there.[6] And if any third party knowingly assists, induces, or harbours a child in escaping from or remaining away from school, the punishment is a fine of twenty pounds, or, in the discretion of the justices, imprisonment for two months with hard labour.[7]

Religious teaching in industrial schools.—One of the points which must be decided by the justices on sending a child to an industrial school is, whether the religious teaching in that school is suitable. With this view the justices must ascertain, to what religious persuasion the child most fitly belongs, and select the school accordingly;

[1] 29 & 30 Vic. c. 118, § 51. [2] 39 & 40 Vic. c. 79, § 16. [3] 29 & 30 Vic. c. 118, § 17. [4] Ibid. § 18. [5] Ibid. § 32. [6] Ibid. § 33. [7] Ibid. § 34.

and meanwhile the child may be detained in the workhouse.[1] When the religious persuasion of a child is considered, what is really meant is—that of the parent or guardian or nearest adult relative. And if a mistake is made, the parent or relative may, on promptly applying, obtain a transfer of the child to a school which is more suitable.[2]

Reformatory school for convicted children.—Another kind of school besides the foregoing is provided, at which attendance is often made compulsory. A reformatory school is a school for juveniles who have been convicted of an offence, where education is combined with rigid discipline; but the main object is to eradicate evil habits and fit the pupil for entering on some employment. It is an alternative selected for those who are more likely to amend their ways during this period of probation, than if they were sent to an ordinary gaol. The treasury may contribute to the expense of such children, but the expense of conveying and clothing the offender is defrayed by the prison authorities, and in some cases a contribution is levied on the parent.[3] Whenever an offender apparently under the age of sixteen has been convicted either on indictment, or in a more summary manner of an offence punishable with imprisonment, and is sentenced to be imprisoned for ten days or longer, he may also be sentenced to be sent, after the expiration of his imprisonment, to a reformatory school for a period from two to five years. Either the judge may at the time or within seven days thereafter name such school; or a visiting justice may do so, before the imprisonment is completed. The judge is to select, if possible, a school suitable to the religious persuasion of the offender, and at least a minister of such religious persuasion may be admitted to visit him at stated intervals. And a parent or nearest relative may obtain a change of the school for similar reasons. Though this is the treatment to which all convicted juveniles under sixteen are liable, yet very young children under ten, if they have not been previously charged with a crime punishable with imprisonment, are not subject to be sent to such a school.[4]

[1] 29 & 30 Vic. c. 118, §§ 18, 19. [2] Ibid. § 20. [3] Ibid. c. 117, §§ 23, 27, 28, 30; 35 & 36 Vic. c. 21, §§ 3, 4, 5.

[4] 29 & 30 Vic. c. 117, §§ 14 16. In 1874 there were in England

Discipline in reformatory schools.—While juveniles are detained in a reformatory school, they are punishable with three months' imprisonment and hard labour for wilfully violating the rules, or for escaping.[1] And all who knowingly assist in, or induce, an escape, or harbour a youth after having escaped, may be fined twenty pounds, or, in the discretion of the justices, be imprisoned for two months with hard labour.[2]

One leading feature, which distinguishes a reformatory from a prison, is the practice of placing the offender out on licence, and permitting him to live with any respectable person who will receive and take charge of him. This can be done by the managers after eighteen months of the period of detention have elapsed; but the licence is not to be in force for more than three months at a time, though it may be renewed for a like period, and it is at the same time always revocable, in which event the offender is bound to return to the reformatory. And any escape of the offender, when out on licence, is punishable like an escape from the school itself.[3] The object of placing an offender out on licence is usually with a view to apprentice him to a trade, which the managers have full power to do, if the consent of the youth is given.[4]

Parent contributing to reformatory school funds.—Another feature of the reformatory school system is, that the parent does not cease to be liable to maintain his child. Whenever the parent, step-parent, or other person legally liable to maintain a youthful offender, who is confined in a reformatory, is of sufficient ability, he may, on complaint made to two justices of the place where the parent resides, be ordered to pay a contribution of five shillings per week towards the maintenance of the child, and which sum goes to defray the charges of the school.[5] And if the parent refuse to pay, his goods may be distrained; and if these are insufficient, he may be committed to prison until he shall pay, though the Secretary of State may remit payments under such order.[6]

Compulsory vaccination of children.—The compulsory

and Wales 53 Reformatory Schools accommodating 5,000 children.—2 *Pike on Crime*, 485.

[1] 29 & 30 Vic. c. 117, § 20. [2] Ibid. § 22. [3] Ibid. § 18. [4] Ibid. § 19. [5] Ibid. § 25. [6] Ibid. §§ 34, 36.

vaccination of children under fourteen years of age is made part of the law for no other reason than that the best scientific evidence, founded on experience, represents it to be a prudent precaution against future disease, and one which parents often neglect till it is too late, either from prejudice, ignorance, or thoughtless inhumanity. The legislature therefore interferes to compel attention to the duty. As, however, the law cannot enforce any duty on an infant personally, the machinery adopted is that of providing the appropriate means, and placing them within reach of the poorest, and then punishing the parent or guardian by fine and imprisonment for wilfully neglecting to avail himself of such means. This compulsion was first resorted to in 1853. The children included in the protection of this law are all children under the age of fourteen years.[1] Illegitimate children are equally included; and the mother is the responsible parent, whom the law fixes with the duty.[2] And, as many children have no living parents, or are in the custody of others, the obligations incumbent on parents in this matter equally extend to those who have such custody of the child, and are its temporary guardians.[3]

Machinery for vaccination of children.—The guardians of all the poor-law union districts subdivide their districts into convenient areas for purposes of vaccination. They are authorised to contract with a medical practitioner or public vaccinator to perform vaccination for a fee of one and sixpence and upwards, according to distance.[4] And they are bound to appoint vaccination officers to enforce the act.[5] And all the expenses of the arrangements are paid out of the common fund.[6] The registrar of births is to give notice within seven days after the registration of the birth of the child, requiring the child to be vaccinated, and stating times and places where the operation may be performed.[7] But the neglect of that and further notices is enforced by a special officer called the vaccination officer, to whom lists

[1] 30 & 31 Vic. c. 84, § 31. [2] Ibid. § 35. [3] Ibid. §§ 16, 29.
[4] Ibid. §§ 2, 6; 34 & 35, Vic. c. 98. [5] 34 & 35 Vic. c. 98, § 5.
[6] 30 & 31 Vic. c. 84 § 28, 33.—The public vaccinator must be a duly qualified medical practitioner.—*Priv. C. Reg.* 1859. He is paid by an allowance proportioned to the number of operations.—30 & 31 Vic. c. 84, § 5, 6. [7] 30 & 31 Vic. c. 84, § 14.

of the births and deaths are regularly forwarded, to facilitate the discovery of offences.[1] The parent or guardian may have the operation performed by a private medical practioner, and the certificate of the operation having been done will, when forwarded to the vaccination officer, satisfy the act.[2] If the operation is not performed, either by a private or a public medical practitioner, then the vaccinator may enforce the act by issuing a summons requiring the parent or guardian to appear before a justice of the peace. The duty imposed by statute on such parent or guardian is to have the child vaccinated, in one way or the other, within three months after the birth, though an excuse for delay may be shown on account of illness, absence, or inability of the parent, or other like cause.[3] And a week after the operation has been performed the public vaccinator is entitled to see the child, in order to ascertain the result of the operation; and if he see fit, he is entitled to take from such child lymph for the performance of other vaccinations; and any parent or guardian, who refuses this lymph to be taken, is subject to a penalty of twenty shillings.[4]

Punishment for neglecting to vaccinate child.—If the parent or guardian neglect to have the child vaccinated, and can show no reasonable excuse, he incurs a penalty of twenty shillings.[5] If a child is insusceptible of vaccination, or has already had the smallpox, these are excuses.[6] Any reasonable excuse must be certified and forwarded to the vaccination officer.[7] Failing such excuse, the vaccination officer may then summon the parent to appear with the child before the justice. The justice may then examine into the matter, and may make an order directing that the child should be vaccinated within a certain time, and if this order is not complied with, the parent or guardian may be convicted of a sum of twenty shillings.[8] The parent may also be convicted and fined twenty shillings for not producing the child.[9] If the parent still refuse, he may be summoned and fined again and again, for

[1] 34 & 35 Vic. c. 98, § 9. [2] 30 & 31 Vic. c. 84, § 23; 34 & 35 Vic. c. 98, § 6. [3] 30 & 31 Vic. c. 84, § 16. [4] 34 & 35 Vic. c. 98. § 10. [5] 30 & 31 Vic. c. 84, § 29. [6] Ibid. § 20. [7] 34 & 35 Vic. c. 98, § 7. [8] 30 & 31 Vic. c. 84, § 31. [9] 34 & 35 Vic. c. 98, § 11.

a previous conviction and fine is not a discharge of his duty under the statute.[1] But as repeated convictions may be oppressive in those few cases, where the parent conscientiously believes that vaccination is injurious to the child's health, it has been provided, that an interval of twelve months shall elapse before a fresh conviction can be made.[2] And independently of the vaccination of children, whoever shall produce or attempt to produce smallpox in any person by inoculation with variolous matter, or by wilful exposure to things impregnated with such matter, or by any other means whatsoever, is liable to be punished by justices with imprisonment for one month.[3]

Besides vaccination there is no other compulsory act done to the body of children on any pretext whatever, beyond what medical skill may suggest as a voluntary cure in each individual case.[4]

Capacity of children for crime and punishment.—Few countries agree as to where the line is to be drawn, at which children become responsible for crime and must bear the punishment. In some of the ancient laws of England a young thief under fifteen was not to be slain, unless he resisted or fled.[5] And some of the early statutes specified, that there should be a milder punishment, if the criminal was under eighteen. The Code Napoleon provided, that if the convicted party be under sixteen, it should be inquired by the jury, whether he acted without or with knowledge of what he was doing; if the former, he was acquitted, or placed in a house of correction, or given up to his relatives ; if the latter, he had some punishment of hard labour, or otherwise, less than an adult would have undergone. In the code of Louisiana criminal responsibility did not commence till the age of fifteen; and no child under nine could be punished by law under any

[1] Allen *v* Worthy, L. R., 5 Q. B. 163. [2] 34 & 35 Vic. c. 98; Knight *v* Hallwell, L. R., 9 Q. B. 412. [3] 30 & 31 Vic. c. 84, § 32.

[4] Herodotus says the Colchians, Egyptians, and Ethiopians had from time immemorial subjected their children to circumcision.—*Herod.* b. 2. Travellers have also found among savages this practice, though they cannot give any definite reason for it, as for example in Australia.—2 *Grey's Austr.* 343; among the Kaffirs.—*Maclean's Kaffirs*, 97; and in Madagascar.—6 *Univ. Mod. Hist.* 114. And mutilation was practised by the Hottentots.—*Ibid.* 389. See *ante*, vol. i. p. 418. [5] Anc. Laws Eng.

circumstances. The civil law held a child of fourteen to be *doli capax*, and therefore punishable for crime.[1] The Jews made thirteen the criminal test.[2] In Spain the age was once fixed at seventeen, and other countries vary considerably. Hale said a child above fourteen was by presumption of law capable of committing any crime, and therefore was punished like others of full age, and was subject also to capital punishment; and he added, that, if the law should not animadvert upon such offenders by reason of their nonage, the kingdom would come to confusion, and no man's life or estate could be safe.[3] But though a child above fourteen was capable of committing any crime, yet in some of the cases, which savoured of torts or mere nonfeasance, and were thus more of a civil than criminal nature, like a disseisin or forcible entry, an infant under twenty-one suffered a milder punishment, as for example, by escaping imprisonment.[4] And he said it was a rule, that statutes giving corporal punishment did not extend to infants; but this was only when the punishment was "as it were collateral to the offence," and at all events a boy above fourteen was guilty of felony for marrying two wives under the statute of that time. Between the age of seven and fourteen, though a child is presumed incapable of committing, or at least of being punished for crime, yet, if he is precocious or *doli capax*, then he may be subjected to capital punishment. Hale said a girl of thirteen was burnt for killing her mistress. In 1629 a boy of eight was hanged for arson. In 1748 a boy of ten was convicted of murdering a girl of five, and while the judges after consultation agreed, that he might be hanged, a delay was suggested for further inquiry; and ultimately a respite was obtained, and after an imprisonment of nine years a pardon was granted on his entering the sea service.[5] Humanity, however, revolts at these punishments at such an age; and this rule about age is obviously a mere notion as to what ought to be the law. The legislature has never laid down any rule, and such punishments are never likely to be repeated.

With regard to one crime depending mostly on a particular

[1] Dig. 1, 7, 40; Ibid. 42, 1, 57. [2] Seld. de Syn. 2, 13, 132. [3] 1 Hale, 24. [4] Ibid. 21. [5] York's Case, Foster 70.

age, namely, the crime of rape, a boy under fourteen is held incapable in law of committing it, or of an assault with intent to commit it;[1] and the same rule applies to the offence of carnally knowing a girl under ten.[2] And no evidence of the individual capacity of a boy under that age is allowed to be given.[3] And yet he may be guilty of aiding and assisting others to commit the offence.[4]

Punishment of juvenile offenders.—When punishment is awarded for crime, the fact of the criminal being young may lessen the period of imprisonment or penal servitude; but otherwise the punishment is the same as in the case of adults, except that in a considerable variety of offences, whipping may be added to the imprisonment, if the boy is under the age of eighteen.[5] In a few crimes, as robbery and attempt to strangle, both men and boys may undergo whippings as part of the punishment, though in cases of boys under sixteen, the strokes are to be no more than twenty-five.[6] In some other offences, namely, those which are punishable as simple larceny, and which justices are empowered to try summarily, the justices may order the boy, if under fourteen, to be once privately whipped, in addition to the punishment of imprisonment.[7] And twenty-five strokes are the maximum of the whipping; and no offender shall be whipped more than once for the same offence.[8] And a special prison for the confinement of young offenders was authorised to be set apart in 1837.[9] The reformatory and industrial schools, for convicted and refractory children, have already been noticed.[10]

Age of majority of children.—The age of majority, namely, twenty-one years, has little or nothing to do with the person or body—its rights, its wrongs, and punishments, though it has much to do with other divisions of the law, such as property, contract, and the control of parents arising out of marriage. It does not, therefore, require any notice here. Laws vary as to the age of majority, and what happens at that date. In ancient Rome the

[1] R. v Groomridge, 7 C. & P. 582; R. v Phillips, 8 C. & P. 736. [2] R. v Jordan, 9 C. & P. 118. [3] Ibid. [4] 1 Hale, 630. [5] See Chap. viii. *ante*, p. 271. [6] 26 & 27 Vic. c. 44. § 1. [7] 10 & 11 Vic. c, 82, § 1; 13 & 14 Vic. c. 37, § 1. [8] 25 Vic. c. 18, §§ 1, 2. [9] 1 & 2 Vic. c. 82. [10] See *ante*, pp. 350, 354.

age of majority was twenty-five. The laws of Menu made it seventeen.[1] The Ripuarians fixed it at fifteen.[2] In Naples it was eighteen: in France as regards marriage it was thirty: in Holland twenty-five.[3] And it is obvious, this is a matter which must vary, according to the varying notions, and habits, and climates of different countries.

[1] 7 W. Jones, 334. [2] Montesq. b. xviii. c. 26. [3] 1 Bl. Com. 464.

CHAPTER X.

VARIATIONS IN THE LAW CAUSED BY SEX.

Variations of law caused by sex generally.—Many variations are also caused in the rights previously described by the circumstance of sex. Undoubtedly, the chief of these may be said to belong to the subject of marriage; but as the security of marriage is one of the separate divisions of the law, nothing here requires to be said as to such of the variations as are caused by that contract, and the relation between parent and child which grows out of it. What require here to be noticed are all such personal wrongs, irrespective of contract and irrespective of marriage, and all such crimes as arise directly out of this quality of sex. The two leading securities arising out of sex are the protection against indecency and against direct attacks on chastity, under each of which general heads there are many variations requiring to be stated. General indecency in conduct or in exhibitions, seduction, abduction, rape, and such offences will accordingly now be stated in the natural order as they affect the individual person.

Indecent exposure of person.—The law goes the length of punishing to some extent any wanton indecency committed in public places. The degree of propriety requisite must vary in different ages; and conduct which would not be indecent at one time may well become indecent under a state of civilisation which has adopted a higher standard of delicacy. In a country having a climate like Great Britain clothing is used to cover the person, and is an essential element of decency. Vagueness, however, attends this kind of offence. It was once attempted to indict a woman for going naked down to the waist, but the court held, in the year 1733, that, as nothing immodest or

unlawful in the circumstances was proved, the indictment must be quashed.[1] Thus it is obviously always a question of degree, as to which the manners of different ages may cause different views to be taken; and the standard of purity seems practically to reside in the jury of the day, who have to judge of the circumstances, and apply the current notions of decency and propriety to the case before them.[2]

Indecency of bathing in public.—One form of indecency is closely connected with a natural right, and has often a meritorious cause, the practice of public bathing. It is a misdemeanour for any person to bathe in a state of nakedness at a place frequented by the public; and to do so was held to be indictable in a case where a man dressed and undressed on the East Cliff at Brighton, and there bathed in sight of the bystanders.[3] Although such is the common law, yet, inasmuch as bathing is in itself a salutary exercise not to be discouraged, it is proper that ways should be found of giving facilities for the practice. If persons were forbidden by the risk of indictment for indecency from bathing in a public place, they might be practically debarred altogether from the exercise; for it has been settled by authority, that no member of the public can justify trespassing over the private lands adjoining the seashore in order to get access to the sea for the purpose of bathing.[4] As a person therefore is liable to indictment for indecency if he bathe in a public place, and is liable to an action of trespass for crossing private lands to bathe in retired spots, there would be a difficulty in the public availing themselves at all of this healthful exercise, unless some mode were devised of avoiding the charge of indecency. To obviate the difficulty, it is usual for urban and sanitary authorities to make bye-laws to regulate the sites and times for bathing in public view, as well as to secure appropriate clothing or the use of bathing machines. And

[1] R. *v* Gallard, W. Kel. 163.

[2] Even in the time of Romulus indecency of person before women was prohibited; and by the Roman law at a later period a woman could sue for personal injury in such circumstances, though there was no solicitation of chastity.—ff. 47, 10, 15.

[3] R. *v* Crunden, 2 Camp. 89. The bathing of men and women together was condemned by Hadrian and Alexander Severus, and finally suppressed by Constantine.—*Lamprid. A. Sev.*

[4] Blundell *v* Catterall, 5 B. & Ald. 295.

ample authority for that purpose is given by the Towns Police Clauses Act and the Public Health Act.[1]

Place of exposure of person.—To expose one's person is an indictable offence, if done wantonly and in a public place. And such place is defined to mean a place open to the public passing by, and where more than one person, if passing, might see what is done, if they choose to look. The doctrine was illustrated in the notorious case of Sir Charles Sedley, who was fined 2,000 marks for exposing his person naked on a balcony in Covent Garden.[2] And the like has been held in case of persons exposing themselves in an omnibus in view of several passengers;[3] or in view of windows of an inhabited house;[4] or where two or more persons have actually seen the offence;[5] or where in a booth at a racecourse the facts occur in presence of those admitted.[6] But where at the time not more than one person, even in a place of public resort, actually saw the offence, or could at the time have seen it, it was held that an indictment was not sustainable.[7] Yet speculation as to the amount of probability of bystanders being within view is to be discouraged, and this ought seldom to be an essential ingredient, if the place be public.[8] The punishment for indecent exposure is fine and imprisonment with hard labour; and the court may in addition bind over the defendant to his good behaviour.[9] It has sometimes been attempted to bring within the somewhat flexible crime of indecency in public places subjects which did not properly amount to the offence. Thus where a man kept a house for taking in and delivering lewd and disorderly women, who, after delivery, left their children chargeable to the parish, it was sought to indict him for the offence; but Lord Mansfield directed the indictment to be quashed, observing that there was nothing criminal in delivering a woman when she is with child.[10]

Other indecent practices.—It is not an offence punishable by law for a woman to pursue the vocation of a street-

[1] 10 & 11 Vic. c. 89; 38 & 39 Vic. c. 55, § 171. [2] R. *v* Sedley, 1 Sid. 568. [3] R. *v* Holmes, Dearsl. 207. [4] R. *v* Thallman, 9 Cox, C. C. 388; R. *v* Mallam, 33 L. J., M. C. 58. [5] R. *v* Bunyan, 1 Cox, C. C. 74. [6] R. *v* Saunders. 45 L. J., M. C. 11. [7] R. *v* Watson, 2 Cox, C. C. 376; R. *v* Orchard, 3 Cox, C. C. 248. [8] R. *v* Harris, L. R., 1 C. C. R. 282. [9] 1 Hawk. c. 5, § 6; Poph. 208; 14 & 15 Vic. c. 100, § 29. [10] R. *v* Macdonald, 3 Burr. 1645.

walker, though in ancient times that class of persons was subjected to summary arrest, as a matter of course. And even instances have occurred of persons being indicted for frequenting a disorderly house, if they knew the character of the house.[1] It has been said also, that it is a misdemeanour to show a monstrous birth for money, and the circumstances may well amount to an offence.[2]

Indecent and obscene pictures and books.—Not only is indecent exposure an indictable offence, but the exhibition of any obscene picture or writing in public places is for like reasons punishable in the same way. At one time it was supposed, that the spiritual court alone had jurisdiction over this offence; but that opinion was carefully reviewed, and the rule laid down, that if the libel or picture was destructive of morality it was indictable.[3] The punishment at common law for the misdemeanour of indecent exposure and obscene publications is fine and imprisonment. The court also assumed to add some corporal punishment.[4] And hard labour was expressly authorised by statute to be added to any other punishment.[5] These offences of indecent exposure of the person and of exhibiting obscene pictures or writings were found to be insufficiently punished by the tedious process of indictment; and the Vagrant Act introduced a shorter and easier way of dealing with them. It is now enacted, that every person wilfully exposing to view in any street, road, highway, or public place, or in the window or other part of any shop or building situate in a street or public place, any obscene print, picture, or other indecent exhibition; and every person wilfully, openly, lewdly, and obscenely exposing his person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female, shall be deemed a rogue and vagabond, and be liable to be committed to the house of correction with hard labour for three months.[6] Not only may the person exhibiting obscene pictures and prints in a window or street be arrested, but

[1] Poph. 208. See as to this offence *post*, p. 393. [2] Herring *v* Walrond, Ca. Ch. 110. [3] R. *v* Curl, 2 Str. 788. [4] 1 Hawk. c. 73, § 21. [5] 3 Geo. IV. c. 114; 14 & 15 Vic. c. 100, § 29. [6] 5 Geo. IV. c. 83, § 4; 1 & 2 Vic. c. 38, § 2; see 2 & 3 Vic. c. 47, § 54.

power is given to constables to enter and search suspected premises, in order to discover if such things are kept for sale, so as to suppress the trade.[1] For this purpose complaint must be made on oath before justices of the peace, that such obscene books or pictures are believed to be kept on certain premises for sale or gain, and that at least one has been sold, or lent, or published; and if the justices are of opinion, that the publication of the book or picture would be a misdemeanour, then a constable is authorised by a special warrant to enter the house in the daytime with force, if necessary, and to seize and carry before justices the articles found. Thereafter, on summons, the supposed owner is required to appear and show cause why the articles should not be destroyed; and if the justices are satisfied that they are obscene, and that their publication would be indictable, they may order the whole to be destroyed, or, if they are not of that character, to be returned to the occupier of the house. The party, whose property is thus seized and dealt with, may appeal to the justices at quarter sessions within seven days.[2] And though sometimes persons charged under this act have set up as a defence, that the object was laudable and praiseworthy, as for example to expose and condemn the indecent practices of others, which form the subject-matter of the publication, this defence has been held insufficient.[3]

The persons who expose their persons, if found committing the offence, may be apprehended by any person and taken before a justice of the peace or handed over to a constable, who is bound thereupon under a penalty to take the person, so handed over to his charge, before the justice.[4] And if the delinquent is, or is reasonably suspected to be, harboured in any lodging-house, a constable may obtain a warrant to enter and apprehend him for the purpose of preferring the charge.[5]

Unnatural crimes.—It is unnecessary to do more than notice, that unnatural crimes have been punished in every age and country with great severity. In our modern law they are punished with penal servitude for life, or not less than

[1] 20 & 21 Vic. c. 83. [2] Ibid. §§ 1, 4. [3] R. v Hicklin, L. R., 3 Q. B. 360; Steele v Brannan, L. R., 7 C. P. 261. [4] 5 Geo. IV. c. 83, § 6. [5] Ibid. § 13.

ten years.[1] And the attempt to commit them is punished with penal servitude from five to ten years, or two years' imprisonment.[2] The laws of King Alfred decreed death, and those of the time of Britton burning alive. And the Mosaic, Greek, Roman, and Gothic laws all assigned death as the punishment of these offences.

How far there is protection of women's chastity.—In every civilised country a sense of modesty and decency is assumed by the law to be native to the mind; and to be valued and appreciated on its own account by each individual. Yet it is not considered necessary to guard and enforce this sense of propriety as a legal right against invasion by third parties, except in a few special cases. The maintenance of chastity and decency obviously depends so much on the habitual conduct of the individual, that, if there is due security provided against assault, or the use by one individual against another of overpowering force in any circumstances, all the instincts of human nature will suffice to do the rest. Though chastity is unknown in savage life, yet in the advanced stages of civilisation it is classed among the highest virtues, and an innate sanctity surrounds it. Among the Nazarenes and Essenes of Judæa, among the priests of Egypt and India, in Tartary and China, in Greece and Rome, chastity has been treated as a mark of elevated sentiment; and the Catholic reverence for the Virgin has done much to maintain the highest standard of this divine virtue. And philosophers have deduced from the widespread unanimity of nations on this subject a leading testimony to the intuitive and immutable distinctions of morality.[3] In all civilised countries the liberty or right of continence is secured in some way by the law, for chastity is one of the great bulwarks of morality. In Athens there was a particular magistrate, who had jurisdiction to inspect the conduct of women. And in Rome during the republic, a domestic tribunal performed a similar function,[4] and seemed to take cognisance of their manners.[5] Cicero said the purest chastity constituted the perfection of woman's nature.[6] And Montesquieu

[1] 24 & 25 Vic. c. 100, § 61. [2] Ibid. §§ 62, 63. [3] 1 Lecky, Europ. Mor. 113. [4] Dion. Halic. b. ii. p. 59; Livy, b. xxxix. [5] Ulp. tit. 6, sect. 9, 12, 13. [6] Cic. De Leg. b. ii. tit. 12.

says, that all nations agree in fixing contempt and ignominy on the incontinence of women; nature has dictated this to all.[1] In the time of Henry VIII. those women above twenty-one, who had vowed chastity, and afterwards married, were declared felons, and made to suffer death, besides forfeiture of land and goods.[2]

The invasion of chastity usually implies the exercise of physical force and violence, for the law is wholly unable to preserve inviolate that higher sense of morality, which is assailed by arguments and machinations only of an intellectual kind. It is only women and children, who require special protection against those offences which spring from lust or sexual appetite. In the case of women, if force is used to violate their persons and subdue their wills at the same time, the offence of rape is the denomination given to the gravest cases, and indecent assault in the other cases; each being an indictable offence and punishable with severity. In the case of female children under a certain age, they are deemed by law to have a judgment too immature to engender that sense of resistance, which is so often an effectual defence in adults. And the law treats similar offences against female children as in the same class as rapes or indecent assaults; but of an aggravated and peculiar character, and punished separately. There is also a special offence singled out for punishment, which is of a kindred character to rape, and called the offence of abduction, which is the forcible carrying away of females who have property, with the intention of marrying them; and there is also a punishment assigned to abduction of women and girls, even though they are not possessed of property at all. But where no violence is used against women in order to obtain possession of their person, but merely artifice, fraud, and deceit are resorted to, and are used to operate upon the female mind, and thereby indirectly procure her consent to the surrender of her person, the law provides no peculiar protection, or one of a very slender kind. The innate sense of modesty, and that sense of self-restraint, which each female is presumed to exercise from a regard to her own self-interest, if from no higher motive, are viewed by the law as supplying the best and only efficient guard of female honour. Hence if

[1] Montesq. b. xvi. c. 12. [2] 31 Hen. VIII. c. 14.

a female be surrounded by falsehood and intrigue, and ensnared to her own undoing, this being deemed a matter within her own means of protection, the violation of her chastity is not deemed a crime or even a cause of action, or indeed the subject of any other legal redress whatever, except when two or more conspire to bring it about. In most of such cases the conduct of both parties is often so inscrutable, that no court could find time to discover adequate tests of the mutual share of blame, nor assign to each the just consequences. Hence, though ruin and degradation often follow swiftly on the loss of chastity, and temporal calamities in the form of loss of reputation, character, and influence, which may last for life, no remedy whatever is awarded to or against either party; for the law in this, as in other cases, refuses to assist or protect one, who voluntarily throws away that which might have been retained.

Remedy for seduction of an unmarried woman.—While, therefore, a female, who acts with vigilance, and is jealous of her honour, is protected by the law against those violations of chastity brought about by force or intimidation, there is no remedy for the loss of chastity by means short of an assault; that is to say, no action for deceit is sustainable. The only exception to this rule is, where a female servant, whether married or not, is seduced. In this case, the remedy lies only when, as a consequence of her seduction, a child is born, or some interruption thereby caused to the service; and the master, and he alone, may in such circumstances bring an action to recover damages. This action is thus not given to the female herself; it is allowed only to her master or mistress for the time being. As regards the husband's remedy for seduction of his wife, that belongs more properly to the division of law, intituled "Marriage."

Difference of modern from the ancient laws as to seduction.—In refusing any legal redress to a woman seduced by the deceit of a man, our law seems to act very differently from many ancient codes; though, perhaps, this may arise from the difficulty of distinguishing what the ancients meant by seduction. It is not clear whether it meant in their view something in the nature of rape, or whether it fell short of rape only by a lesser degree of violence, or whether it

meant what we mean by seduction, namely, where no violence whatever is used, but, nevertheless, the woman's chastity is parted with. The notions of the ancients were also affected by the prevalence of slavery; but whatever may have been the concurrent causes, they looked after the wrongs of the seduced woman much more strenuously than we do. By the Mosaic law the seducer was bound to marry the girl, at least if of tender age, and in all cases to pay compensation as an alternative.[1] By the civil law of the Eastern Empire, the seducer was bound either to marry the seduced, or pay her half of his substance.[2] And by Justinian's law, if he did not pay her half of his personal estate, he was liable to corporal punishment and five years' banishment.[3] And if the female was at the time engaged to marry another man, the seducer's nose was cut off.[4] By the Buddhist law of the sixth century, also, the man was compelled to marry her.[5] And it rather appears, that in the Roman law an action was competent by either sex for a violation of the other's chastity.[6] And a freeman was beat with cudgels, and a slave was scourged for the offence. The Athenians also fined a seducer, though mere persuasion alone was used.[7] The Gentoo code also fined the man, except when the woman was a loose character.[8] The Wisigoths had this singularly harsh law, that if a married man seduced a girl, she was to be given up to the injured wife to take what revenge the latter pleased.[9] The laws of King Alfred, following the Levitical law,[10] made it imperative for the seducer to marry the woman, if the father would permit her; if not, the father was to have money for her dowry.[11] And in the time of King Edmund, the man who committed fornication with a nun was refused burial in a consecrated place.[12]

Action for seduction of unmarried woman.—The seduction of an unmarried woman, as already stated, is in our law no cause of action *per se* to the woman.[13] Yet if she was a servant, her master then has such a right to her services

[1] Seld. Ux. Heb. b. i. c. 16. [2] Basilic. 60, 37, 80. [3] Inst. 4, 18, 4. [4] Basilic. 60, 37, 83. [5] Jolly's Navada, c. 12 (A.D. 500). [6] ff. de Injur. 47, 10, 9, 29. [7] Plut. Solon; Plato Leg. b. viii. [8] Gent. Code, c. 19. [9] Lindenbrog, p. 64. [10] Exod. xxii. 16. [11] Laws K. Alfred, § 29. [12] Laws K. Edmd. A. D. 940-946. [13] Saterthwaite v Duerst, 4 Doug. 315; 5 East, 47 n.

that he may recover damages, if the direct consequence of the seduction has been to cause the birth of a child, and consequent loss of the service. These actions are usually brought by the parent of the seduced woman. A parent, *quâ* parent, has no right to recover damages for the loss of service caused by the seduction of his daughter, though he may have paid expenses of doctors and nurses on her account.[1] But the parent, *quâ* master, has the same right as other masters; and very slight acts of service, without any actual or formal hiring, will be accepted as sufficient evidence of the relation of master and servant existing between parent and daughter, so as to support such action at the instance of the parent. And a guardian or person standing *in loco parentis* towards the servant, has the same right of action as the parent and master, and on the same grounds.[2]

When a parent sues in this action, he need only show that his daughter lived in his house and gave some slight services while there. But she is not the less her father's servant, that she is on a temporary visit elsewhere at the time of seduction.[3] And after leaving another service, if while on her way to her father's house, where she intends to become his servant, she is then seduced, the father may have this action.[4] And it is the same, though she is a married woman separated from her husband, for as against a wrongdoer her husband's claim upon her services cannot be set up by the defendant.[5] And the action lies, where the defendant had hired the girl for no other purpose than to seduce her more easily; for in that case the relation of master and servant is treated as never legally established between the defendant and her; and her last master would be deemed her real master, at least if a few days only elapsed since she left the previous place.[6]

On the other hand, the father's position of master towards his daughter will be disproved by the fact of her having a house or business of her own;[7] or by her being in the service of another person at the time of seduction, even

[1] Grinell *v* Wells, 7 M. & Gr. 1033. [2] Irwin & Dearman, 11 East, 24; Edmonson *v* Machell, 2 T. R. 4. [3] Griffiths *v* Teetgen, 15 C. B. 344. [4] Terry *v* Hutchinson, L. R., 3 Q. B. 599. [5] Harper *v* Luffkin, 7 B. & C. 387. [6] Speight *v* Oliveira, 2 Stark. N. P. C. 493. [7] Manley *v* Field, 7 C. B., N. S. 96.

though she is in the parent's house for a few days at that time;[1] and even though she used to leave such service occasionally, and visit and assist her parent.[2] And the mere circumstance that she intended eventually to return to her father's house, should she leave another service, will not make her the servant of the father until she begin to return.[3] The most trifling acts of service, as already stated, have been taken to be sufficient evidence of the hiring or implied hiring of the daughter by the parent, as for example, milking the cows;[4] or making tea;[5] or assisting her parent a few hours after her daily work elsewhere each day.[6] And the true view is, that even such trifling acts of service need not be proved, when the daughter is living in family with her parents.[7] Most of the authorities, it is true, represent that it is indispensable in this action to prove some actual service, and the loss of that service as the cause of action.[8] The tendency has been of late years, however, to hold, that the mere fact of a daughter living with a parent is sufficient evidence of service, because otherwise, a father in the higher ranks of life, where no acts of service by a daughter are usual, in the ordinary sense, could never bring such an action.[9] And though this seems in effect to make the seduction *per se* actionable, as if it were the object of the law to advance morality, which is a questionable mode of putting this legal liability, yet the rule is salutary when confined to daughters living in family. It has been often observed, that courts of law have favoured this action, and even encouraged fictions and strained rules, in order to give a remedy for the seduction *per se*, under the guise of the nominal wrong to a third party. But the practice is firmly rooted, and often does substantial justice, and punishes aptly a wrong that deserves a remedy; for the breaking up of a family circle and its disgrace is, or ought to be, a good cause of action.

This relation of servant and master, howsoever attended

[1] Dean v Peel, 5 East, 47; Hedges v Tagg, L. R., 7 Exch. 283. [2] Thompson v Ross, 5 H. & N. 16. [3] Blaymire v Haley, 6 M. & W. 55. [4] Bennett v Alcott, 2 T. R. 168. [5] Carr v Clarke, 2 Chitt. R. 261. [6] Rist v Faux, 4 B. & S. 409. [7] Evans v Walton, L. R. 2 C. P. 615. [8] Grinnell v Wells, 7 M. & Gr. 1033. [9] Maunder v Venn, M. & M. 323; Terry v Hutchinson, L. R., 3 Q. B. 599.

with service, must have existed at the time of the seduction, for the cause of action must have arisen then or not at all. What happens after that date is immaterial, and does not relate back to the time of the wrong done. And hence, when a daughter is in a situation and is there seduced and pregnant, then leaves it and returns and lives with her father, his cause of action does not arise; for she was not her father's servant till after the event occurred.[1] And the seduction, as already stated, is not the sole cause of action; it must be followed by the birth of a child and loss of service as a consequence thereof. Hence if the defendant seduced the servant, yet was not the father of the child, the birth of which caused the loss of service, there is no cause of action against him.[2] This is not, however, because the birth of a child is absolutely necessary as part of the cause of action: it is only because that is one form of interruption to the service, for even enticing and keeping the woman away, without debauching her, would be equally a good cause of action, if she was a servant to her parents, or assisted in some domestic or other services.[3] Moreover, the loss of service must have been the direct consequence of the seduction and birth of a child, and not of the conduct of the defendant after the birth, as, for example, by such conduct causing illness to the woman.[4]

Amount of damages in actions for seduction.—The gist of this action being loss of service, the damages ought in strictness to be confined to that loss; and loss of station or character ought not to be considered.[5] But the principle has been strained in order to remedy a defect in the law; and judges countenance the practice of juries giving damages, not only proportioned to the loss of service, but inflamed by a desire to inflict some punishment upon the defendant. The proper direction to the jury therefore, is, that they are not confined to the mere fact of loss of service, but may give such damages as they consider reasonable in the circumstances of the case, having regard to the previous character of the servant, and the condition in life of both parties, and the destruction of the family good name.[6]

[1] Davies v Williams, 10 Q. B. 728. [2] Eager v Grimwood, 1 Exch. 61. [3] Evans v Walton, L. R., 2 C. P. 615. [4] Boyle v Brandon, 13 M. & W. 738. [5] Irwin v Dearman, 11 East, 23. [6] Andrews v Askey, 8 C. & P. 9; Irwin v Dearman, 11 East, 24.

And as the damages may be inflamed by the misconduct of the defendant, it is competent for the plaintiff, in order to show that the defendant effected the seduction under the guise of honourable courtship, and the woman was not without honour up to a certain stage of conduct, to ask if there had been a courtship.[1] Yet no direct evidence of a previous promise of marriage is admissible, for breach of such promise is a distinct cause, for which another action may be brought; and if incidentally evidence of such promise has been given, the jury ought to be directed to exclude that matter from their consideration.[2]

Conspiracy to ruin woman's chastity.—Female chastity, though incapable of being entirely protected by the machinery of the law, is so valuable a possession, that a conspiracy of two or more persons to undo a woman, is held to be indictable at common law, irrespective of any contract of service; and this is founded on the doctrine, that, while a woman might be able to defend herself against the machinations of one man, she cannot be expected, and no fallible being can be expected, to be equal to warding off the villany of two or more, leagued together for such a purpose. Hence, when Sir Francis Delaval, a libertine bent on ruining a girl, then apprenticed to a music master, got this music master, for a sum of 200*l.*, to assign the indenture to himself; and the assignment purported to bind her to Sir Francis to learn music, and not to leave his apartments, whereupon he lived with her, and paraded her as his mistress, Lord Mansfield allowed a criminal information to be filed against Delaval, and the music master, and the attorney who knowingly drew the deed, for a conspiracy to ruin the girl. And though in course of the proceedings, and after *habeas corpus* issued, the girl preferred to return to Delaval, yet the rule of law was laid down; it is true, in that instance somewhat too late to be effective.[3] In the case, however, now specified, no force whatever was used. And other similar instances have occurred of a conspiracy, without force, to procure the debauching of a female.[4] In 1667, where a distant kinsman, who used to visit a house, and make love to a

[1] Dodd v Morris, 3 Camp. 520. [2] Tullidge v Wade, 3 Wils. 18. [3] R. v Delaval, 3 Burr. 1434; 1 W. Bl. 409, 439. [4] R. v L. Grey, 3 St. Tr. 519.

young heiress of sixteen, contrived, along with others, to make an appointment without the guardian's consent, in order to meet and marry her, the parties concerned were all held indictable for conspiracy, though no force was used, and the lady rather encouraged the transaction.[1] So also informations have been allowed for conspiracy to decoy a young heir from school, and, by making him drunk, procuring him to marry a woman of ill fame.[2] And a conspiracy to procure, by false pretences, connection with a young female, was very recently held to be indictable.[3] And in like manner, it is a misdemeanour for persons to conspire to persuade a woman to become a common prostitute, though no force of any kind is used towards her.[4]

Abduction of women.—Another offence to which women, by reason of their sex, are liable is that of being carried away for purposes of being forced into marriage, or being carnally known and abused. This offence is punished under the name of abduction. At first the offence was confined to women having property, but now it includes women also having no property. There is authority for saying, that at common law the abduction of a woman is an offence.[5] The first statute was passed in the time of Henry VII., and from the time of Elizabeth to George IV. abduction was a capital crime, without benefit of clergy. Lucre at first was the chief ingredient of the offence. But Hale also complains that in his time it was necessary to prove either a subsequent actual marriage or defilement, as a sequel of the initiatory compulsion. It was left for the times of George IV. to substitute the intent to marry or defile as sufficient to represent that ingredient of the business. The essence of the offence under the statute of Henry VII. was the taking by force.[6] And it was remarked of the law as it stood at that time, that it was deemed a less crime to steal a lady with a fortune of 10,000*l.*—body and purse—than to steal twelve pence of her money or goods.[7]

Offence of abduction of unmarried women for lucre.—The chief offence of abduction now consists in taking away or

[1] R. *v* Twisleton, 1 Lev. 257. [2] R. *v* Thorp, 5 Mod. 221. [3] R. *v* Mears, 2 Den. 79. [4] R. *v* Howell, 4 F. & F. 160. [5] East. P. C. 458; 2 Mod. 128. [6] Swendon's Case, 14 St. Tr. 595. [7] Rawlinson, arg., 14 St. Tr. 562.

detaining against her will, from motives of lucre, any woman of any age, who has an interest, legal or equitable, in any real or personal estate, or who is presumptive heiress, or next of kin to one having such property, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person. The offence is felony, punishable with penal servitude not exceeding fourteen nor less than five years, or with imprisonment not exceeding two years with or without hard labour. And the party found guilty is incapable of taking any interest in the woman's property; and if any marriage shall have taken place, the Attorney-General may apply to the Court of Chancery to settle the property accordingly.[1]

In order to constitute this crime of abduction for lucre, it thus appears that there must be three conditions: first, the woman must have property; secondly, the motive of the party in forcing the woman must have been lucre; and thirdly, the intent must be to marry or defile her. The combination of these ingredients shows, that the woman must be unmarried, otherwise the intent to marry her would be unmeaning, for the words "or carnally know" can only be viewed as a means or an imperfect carrying out of the intent to marry. By marriage the husband would, *prima facie*, acquire a certain control over an unmarried woman's property; but if the woman was married, he could acquire none by the course described in the act. As regards then the first of these conditions, when it is said that the woman must have property, this means, not that she is likely at some future time to be the legatee or next of kin of a wealthy parent or relative, but she must already have at the time some vested right or interest in some property, and at least a limited control over that property. Abduction cannot be said to be an offence punishable for the exclusive protection of the rich, for the amount of property is not defined; and, therefore, however small that amount may be, the statute will apply. The consent of the woman is a matter that must be clearly disproved, for unless the taking is forcible, this statute is inapplicable. If the woman be at first taken away forcibly, but consent during the journey, the statute will not be got rid of, for the weakness of the woman afterwards cannot condone the original offence,

[1] 24 & 25 Vic. c. 100, § 53; 27 & 28 Vic. c. 47.

if it was complete on the first taking. And though in the first instance the woman may have consented, she is entitled at any moment to revoke such consent, and after such revocation the detainer will equally be a violation of the act. It is not necessary, in order to complete the offence, that the intent to marry or defile should have been carried out.. The taking away or detaining must have been carried out in part, but the mere intent to marry or defile is enough of itself without being accomplished in point of fact. Lastly, the motive governing the whole conduct must have been lucre. If the violence was used solely in order to gratify the passions, the crime of rape or an attempt to commit rape may have been committed, but not this crime of abduction. Yet, as the motive is always an inference from the conduct, it will suffice that some evidence, however weak, leads to this inference. Thus, where the prisoner said that he had seen a will, and that the female was to have 200*l.* a year, this was deemed a matter, which a jury should take into consideration.[1] And in regard to this offence, as it is one committed against the woman personally, she is a competent witness, whether the ceremony of marriage has actually taken place or not between herself and the man. The necessity of the case requires that her evidence should be available, and without her evidence it would generally be impossible to convict.[2]

Abduction of girl of property under twenty-one.—Another species of abduction relates to females of a certain age. Where the woman is under twenty-one, a similar but separate offence is committed under slightly different conditions. "Whosoever shall fraudulently allure, take away, or detain such woman (*i.e.* a woman having property), being under the age of twenty-one years, out of the possession, and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married, or carnally known by any other person, shall be guilty of felony," and punishable as in the previous cases, and subject to the same deprivation as regards the property of the woman.[3] With regard to this

[1] R. *v* Barratt, 9 C. & P. 387. [2] R. *v* Perry, 1 Hawk. P. C. c. 41, § 13; R. *v* Serjeant, 1 Ry. & Mood. 354. [3] 24 & 25 Vic. c. 100, § 53.

offence, though it is subject to the same punishment as in case of older women, there are some features which distinguish it from the former, proportioned to the youth of the woman. In this case the motive of lucre need not be proved against the abductor; and the means of taking away the woman may come under the head of fraudulent allurement, though no force be used. Young and credulous women may be cheated, as it were, out of their will by false and specious overtures inducing a semblance of consent on their part; and if there is fraud as an ingredient, it matters little, what the details of the allurement may be, for the consent of the female is wholly immaterial.

Abduction of women with or without property.—Again, the case of women having no property also requires notice as well as the two offences of abduction as regards those women, above and under twenty-one years of age, who have property. Women who have no property are also specially protected; and the law without regard of persons makes the punishment precisely similar. The enactment as to these is this: "Whosoever shall by force take away or detain against her will any woman of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony and liable to penal servitude not exceeding fourteen, nor less than five years, or to imprisonment not exceeding two years, with or without hard labour."[1] The chief distinction in the two offences is, that the motive of lucre need not here be proved against the man, nor need any provision be made as to what is to be done with her property, if any marriage shall have taken place.

Abduction of girls under sixteen without property.—Lastly, as regards young women who have no property, but who are often inveigled from the custody of parents or guardians by false allurements of marriage or other benefits, the law has singled out for special protection young girls under the age of sixteen. The enactment is: "Whosoever shall unlawfully take or cause to be taken away any unmarried girl, being under the age of sixteen, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be

[1] 24 & 25 Vic. c. 100, § 54; 27 & 28 Vic. c. 47.

guilty of a misdemeanour, and liable to imprisonment not exceeding two years, with or without hard labour."[1] If the purpose be nothing dishonourable, as for example for the purpose of marriage, the man who marries her is nevertheless liable to be convicted, as having impliedly by the marriage taken her out of the father's possession, though she after the marriage still live with her father, for it puts an end to the father's legal possession[2] as much as if he took the girl solely to gratify his passion. The unlawfulness of the taking is an ingredient of the offence, yet this may mean nothing more than an immoral purpose; while if there is a colour of right in the party abducting, though mistaken, the *malus animus* will be negatived.[3] Where, however, the man reasonably believes the girl is under sixteen, whereas she is above that age, he is equally liable; for the object of the statute was to protect the *de facto* legal possession of the father, and whoever without excuse violates that right is guilty of the offence, and takes the chance of his mistake as to age.[4] But if the man finds the girl, so to speak, at large, not knowing that she is in any parent's custody, he is not in that case guilty.[5]

With regard to the consent of the parent, a stepfather or stepmother's consent is not important, for the custody belongs to the natural parent only. Even if an illegitimate child be under the care of her natural father, his consent is that which is needed. A father's right to the custody of a legitimate child is indeed a legal right, and any infringement of it is a misdemeanour.[6] But if the control of the parent has been lax and ambiguous, it would be difficult to convince a jury, that the taking away was against his or her will.[7] The consent of the girl is also immaterial; whether she actively consented, or was falsely deceived into a consent, or the parent was deceived by some false representation, does not protect the party from conviction.

Ancient punishments for rape.—The rape, or forcible violation, of women has been a conspicuous crime in every

[1] 24 & 25 Vic. c. 100, § 55. [2] R. v Baillie, 8 Cox, C. C. 238
[3] R. v Tinkler, 1 F. & F. 513. [4] R. v Prince, L. R., 2 C. C. R. 154.
[5] R. v Green, 3 F. & F. 274; R. v Hibbert, L. R., 1 C. C. R. 184.
[6] R. v Greenhill, 4 A. & E. 627; Ex p. Barford, 8 Cox, C. C. 405.
[7] R. v Primelt, 1 F. & F. 50; R. v Fraser, 8 Cox, C. C. 446.

code, ancient and modern. By the Mosaic law a fine of fifty shekels to the father was imposed on the ravisher, who was also obliged, if the father and girl consented, to marry her;[1] while, if the female had been betrothed to another, he was stoned to death.[2] A fine was also imposed by Solon's law; and at a later date the man was put to death.[3] But Solon declared that a prostitute could not be the subject of rape. By the law of ancient Egypt the man was mutilated.[4] The Gentoo code made the man marry the woman, otherwise he was put to death;[5] while the laws of Menu awarded corporal punishment, or cut off two fingers.[6] The Incas of Peru, as to one of their worst offences, that of violating one of the virgins dedicated to the sun, directed that not only the criminal, but his children, servants, and relations, should be put to death, as well as all the inhabitants of his village, down to the babes and sucklings, and all their flocks; and that the village itself should be destroyed, and the site of it strewn with stones.[7] The chastity of a Vestal virgin was also surrounded by the Roman law with severe punishments, and she herself was buried alive in a vault, with a lighted lamp, and some bread and water.[8] By the civil law an ordinary ravisher was subject to the interdict of fire and water, or banished; and at a later date was put to death by beheading or burning.[9] And by the Eastern code his nose was cut off, and half of his estate was forfeited to the woman, unless she compelled him to marry her.[10] The code of Theodoric, King of Italy, compelled the man to marry the ravished woman.[11]

Ancient English law of rape.—The Anglo-Saxon laws, like those of the Welsh, the Wisigoths, Burgundians, Lombards, and Bavarians, imposed a fine on the ravisher.[12] And at a later stage, putting out the eyes and mutilation were the punishments.[13] The law of King Alfred mutilated the ravisher even of a female slave. The Welsh law

[1] Seld. Ux. Heb. 120. [2] Deut. xxii. 25. [3] Plut. Solon.; Meursius, Them. Att. b. i. c. 7, p. 18. [4] Diod. Sic. b. i. [5] Gent. Code, c. 19. [6] 7 W. Jones, 389. [7] Com. of Incas, b. iv. c. 3. [8] Dion. Hal. b. ii. c. 67; Plut. Numa. [9] ff. Leg. Jul. 48, 63; Cod. 9, 13. [10] Basilic. 60, 37, 82. [11] Lindenbrog, 250. [12] L. Ethelb. § 81; Knut, § 49; Alfred, c. 25; Anc. Laws of Wales: Lindenbrog, 67, 280, 321, 577. [13] 13 Ed. I. c. 34; Year Book, 30 & 31 Ed. I. App. 500.

mutilated also, unless a fine was paid.[1] The ancient Scotch laws of Kenneth II. punished the ravisher, with death unless he consented to marry the woman.[2] The option of the woman to marry the ravisher seemed also to be recognised in England in the time of Henry III.[3] Death or marriage seemed thus nearly the stereotyped mode with the ancients and in the middle ages of dealing with this crime. One difficulty arose however in applying it. Coke says, that the Romans were perplexed what to do, if there were two offences, and one woman demanded death and the other woman demanded marriage; and he lays it down as clear, that, whatever the Romans may have thought of it, our law would give preference to the woman who demanded death.[4] All these perplexities, however, were put an end to in the time of Edward I.[5] Doubts, indeed, have existed whether before the statute 13 Edward I. c. 34, rape was felony, but it has been observed that at first a distinction was made between *rapt* and *viol*, the former corresponding to seduction, and the latter to rape as now understood, and the latter only being treated as a felony This was the old French and Swedish law also.[6]

Modern law of rape of women.—The modern law of rape is, that whosoever is convicted of the crime of rape is guilty of felony and liable to penal servitude for life or not less than five years, or to imprisonment not exceeding two years with or without hard labour.[7] In order to define more particularly this offence, regard must be had to (1) the tests by which carnal connection is proved, (2) the tests by which the resistance of the woman, or the refusal or absence of consent, is proved. As to the first point, to get rid of difficulties formerly raised, an express definition was given by the statute of what was meant.[8]

Resistance of women in case of rape.—The second criterion as regards rape is, that the woman must have resisted the assault of the man; but what amounts to resistance must

[1] Gwent. Code, b. ii. c. 29. [2] Hect. Boet. b. x. fol. 101.
[3] Bract. b. iii. c. 28, f. 147. [4] 2 Inst. 180. [5] Ibid. 434
[6] Barringt. Stat. 140.
[7] 24 & 25 Vic. c. 100, § 48; 27 & 28 Vic. c. 47. By the ancient law of England and Scotland a woman could also be convicted of the ravishment of a man.—*Glanv.* b. xiv. c. 6; 2 *Forbes, Inst.* 125.
[8] 24 & 25 Vic. c. 100, § 63.

depend considerably on the surrounding circumstances, and may be a question left to the jury as an inference, which is to be drawn mainly from her conduct immediately afterwards.[1] There is no limit, as already stated, to the right and power of a woman to resist a ravisher; and it has always been held that she may kill him in defence of her chastity.[2] Yet if the woman's consent has been obtained wholly by trick or personation, and any species of falsehood and deceit, inasmuch as no force has been used, the crime has been deemed not to be committed.[3] But this is a doctrine which should scarcely ever be listened to in an age of civilisation. And hence where the trick consisted in a pretended medical or surgical operation on an ignorant woman, the courts have justly repudiated this distinction, and held the man properly convicted.[4] Moreover, if instead of thus tricking a woman out of consent, some physical means is used to prevent her expressing her dissent, the crime is held to be committed, and the man may be convicted of a rape: as, for example, where he gives her a potion to stupefy her.[5] Or, when he threatens her life if she refuse.[6] Again, there may be cases where the woman, from defect of intellect, is incapable of giving or refusing her consent, as where she is an idiot; in such circumstances the man may be justly convicted.[7]

Evidence as to woman's complaining after rape.—The offence of rape is one, which is at once difficult to prove and difficult to disprove. As the essence of the offence is, that the act was done without the woman's consent, or rather in spite of the woman's dissent, and this is necessarily a fact difficult to get at, from the obvious want of witnesses, much depends on the credibility of the woman who accuses, and this is a vital incident in the proof of the offence. Her conduct, both before and immediately after the imputed offence, forms a leading feature of the evidence required to establish it; and if anything can be proved which tends to show that she may have given her consent, this hypothesis may be resorted to by a jury in order to justify a verdict of acquittal. The

[1] East, P. C. 445. [2] Bac. Elem. 64; 1 Hawk; 71 see *ante*, Vol. i. p. 353. [3] R. *v* Charles, Dearsl. 397; R. *v* Barrow, L. R., 1 C. C. 156. [4] R. *v* Flattery, 36 L. T., N. S. 32. [5] R. *v* Camplin, Den. C. C. 89; 1 C. & K. 746. [6] R. *v* Jones, 4 L. T., N. S. 154. [7] R. *v* Fletcher, Bell, 63.

courts gave way to lamentable niceties and distinctions as to the proof of this crime in the case of young females, which the legislature has at last wisely put an end to by making definite enactments applicable to two stages of infancy, namely, girls who are between ten and twelve, and girls who are under ten; and proportioning the characteristics of the offence to those ages respectively, and especially guarding to some extent against the difficulty arising out of consent or supposed consent on the part of the child. Not only is it of vital importance that the woman's veracity should be above suspicion, but some extraneous confirmation of her story is generally sought in her conduct immediately after the crime. It is thought natural, that a woman subjected to such an outrage should not only exhaust all the available means of resistance at her disposal at the time, but should take the first opportunity afterwards of recounting her wrongs to her relations or friends, while she is still smarting under her feelings of shame and revenge. Hence it is of vital consequence to show that at the first opportunity she made a complaint to a friend, neighbour, or third person, of some outrage of the kind. The details of such complaint, or the name of the perpetrator, are not allowed to be given in evidence, because to do so might tend to enable a prosecutrix to manufacture her own evidence; but the abstract fact, that she made such a complaint to some third person, is a material part of her case, and its absence, in circumstances where it might have been reasonably expected, detracts considerably from her credibility.[1] With this view an attempt is generally made on the part of the accused to show, that the woman is of loose character, and by the practice of the courts she may be asked specific questions as to whether she has committed immoralities with other men or with the prisoner on former recent occasions; yet if she deny these imputations, such men cannot be called as witnesses to contradict her.[2]

[1] R. v Megson, 9 C. & P. 420.

[2] R. v Holmes, L. R., 1 C. C. R. 334. In the old Welsh laws the oath of the woman as to a rape was conclusive; and she was not allowed to be contradicted by other evidence.—*Vened. Code*, b. 2 c. 1 § 36; *Dimet.* c. b. 2 c. 5. But at a later period she was to be examined.—

Accessories in the offence of rape.—Rape is an offence, in which several persons often assist to a greater or less degree. If any person, whether man or woman, or the husband of the woman ravished, is present assisting the perpetrator, such person may be indicted as a principal in the crime.[1] And an accessory after the fact is liable to imprisonment with hard labour for two years.[2]

Assault with intent to commit rape.—Where the crime of rape has not been completed, an indictment will lie for an assault with intent to commit it. A verdict finding an attempt to commit a rape may also be given on a charge for rape.[3] The assault with intent to commit is a separate offence, and is indictable at common law; and if on such trial it appear, that a rape was committed, the judge may either discharge the jury and direct an indictment for rape, or punish on the conviction for the assault. On the indictment for the assault with intent, it must be shown, that the prisoner was bent on the chief crime, and intended at all hazards to commit a rape.[4] The punishment for this assault with intent is two years' imprisonment and hard labour; and a fine may be added, as well as an order made to enter into recognisances to keep the peace and be of good behaviour.[5]

Rape on girl under ten.—Where the offence of rape, or what is like it, is committed on a girl under the age of ten years, the ingredients of the offence are considerably qualified. The consent of a child cannot be reasonably deemed to be consent, in the same sense in which such a term is used with respect to an adult; and whether it is given or refused ought to be wholly immaterial. Hence it is enacted, that, whosoever unlawfully and carnally knows and abuses any girl under the age of ten, is guilty of felony. The punishment is the same as that for rape.[6] And an attempt to commit this offence is punishable with two years' imprisonment with or without hard labour.[7]

Ibid. b. 2, c. 7. The Sicilian Constitutions made it essential, that the woman should complain within eight days.—*Barringt. Stat.* 142.

By a singular law of Sweden it was said to be provided, that a child born of rape should be deemed legitimate.—*Stiernh.* b. 2, c. 9.

[1] 24 & 25 Vic. c. 100, § 67. [2] Ibid. [3] 14 & 15 Vic. c. 100, § 9. [4] R. *v* Lloyd, 7 C. & P. 318. [5] 24 & 25 Vic. c. 100, §§ 38, 71. [6] Ibid. § 50. [7] Ibid. § 51.

One of the difficulties attending the proof of this offence arises from the tender age of the girl abused and her defects as a witness. No evidence being admitted except on oath, a child of five or six years old seldom evinces the intelligence required to answer the usual tests as to the obligations of veracity. Her statement of details to a parent or friend is inadmissible for the same reason that details are rejected in the case of rape.[1] Some judges, where the girl has from defective education failed to comprehend the responsibility of an oath, have postponed the trial for the sole purpose of enabling the child to be educated on that point.[2] And though this course seems not to have been done where the child is under the age of six, no rigid rule can be laid down on such a subject.[3] And should the child be rejected as a witness from defect of age and discretion, it follows, that her statement to her mother or other friend or guardian will be equally rejected; and the crime thus often goes unpunished.[4]

Another circumstance connected with such offence is this, that there may have been a species of consent on the part of the child. To meet this condition of things there is usually a separate charge of assault with intent, along with the charge of carnal knowledge and abuse, so that the former may be punished if the latter fail in proof. But it has also been held, more than once, that a child under ten may consent to what would otherwise be an assault connected with the crime here indicated; and if so, there can be no conviction for such assault.[5] And apparently the view, that it should be left to a jury to say, in each case, whether the child had any definite knowledge of what consent meant, has been repudiated, or not accepted, so far as relates to assault. But where a man was charged with the attempt to commit this specific crime, he was held properly convicted, though the child consented.[6] And this rule has been also applied to a kindred subject, in which children are concerned, where the court held that mere

[1] R. *v* Brazier, Leach, C. 199; East, P. C. 441. [2] R. *v* Murphy, Leach, C. C. 430 n; R. *v* Baylis, 4 Cox, C. C. 23. [3] See *ante*, p. 337. [4] R. *v* Nicholas, 2 Cox, C. C. 136; 2 C. & K. 246. [5] R. *v* Read, 1 Den. C. C. 377; R. *v* Cockburn, 3 Cox, C. C. 543; see *ante*, vol. i. p. 293. [6] R. *v* Beale, L. R., 1 C. C. 10.

acquiescence, or passive conduct, is not consent in this sense.[1]

Rape of girl between ten and twelve.—While it is necessary to treat as felony, and punish with greater severity, offences in the nature of rape on girls under ten, it is also necessary to treat specially the case of girls between the ages of ten and twelve. In the latter case, the same offence is declared to be a misdemeanour. The enactment as to this is, that, whosoever shall unlawfully and carnally know and abuse any girl, being above the age of ten years, and under the age of twelve years, shall be guilty of a misdemeanour; and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of five years, or to be imprisoned for any term not exceeding two years, with or without hard labour.[2] An attempt to commit this offence is also punishable separately with two years' imprisonment, with or without hard labour.[3] In reference to this offence, as well as the last, the consent of the girl is altogether immaterial. It is true, if the child consents, it is said that the person cannot then be convicted of an assault, which may be viewed as an element of all such offences; but as regards the more serious statutory offence, of having carnal knowledge of the child, this is equally committed whether the child consent or not.[4]

Vexatious indictment for indecent assault.—Owing to the peculiarly obnoxious charge, so often preferred without cause, by designing persons, for an indecent assault, in order to extort money, and which charge it is so difficult, as well as scandalous, to resist and to refute, a check has been put on the indiscriminate resort to such a remedy. Instead of allowing, as in the usual case, an indictment to be preferred before a grand jury by any irresponsible party, and thereby involving persons of blameless reputation, almost without notice, it is enacted, that no indictment for this charge shall be entertained, unless the subject has been first inquired into by justices of the peace, and the defendant either committed for trial, or at least the prosecutor bound over by the justices to prosecute. And the prosecutor may insist on being so bound over.[5] Thus

[1] R. v Lock, L. R., 2 C. C. 10. [2] 24 & 25 Vic. c. 100, § 51; 27 & 28 Vic. c. 47. [3] Ibid. § 51. [4] R. v Guthrie, L. R., 1 C. C. 241. [5] 22 & 23 Vic. c. 17; 30 & 31 Vic. c. 35.

some preliminary notice is secured, and care is taken, that no charges of this description are either frivolously made, or made without reasonable notice. And on acquittal the prosecutor may be ordered to pay the costs of the defendant.[1]

How far prostitutes are put under restrictions.—We now come to a subject which arises peculiarly out of the quality of sex, and which has given great trouble and caused wide variety of treatment among the legislatures of the world, namely, how far prostitutes require supervision. It is here that the law comes closely into an alliance with morality, and the contrasts are seen between their separate spheres of action. In all civilised countries the practice of prostitution has been condemned and discouraged by the law; and yet as the main function of law is to restrain human conduct, only so far as it directly interferes with the security of others, that function is wholly negative. It can thus do little to repress the proclivity of human nature, which here is the active agent, and which it is the province of morality most of all to deal with. Morality, as has been previously noticed, has a wider range than the law, and addresses the primary instincts in a different way by inducing man to act rightly through subduing and controlling the springs of action. All that the law however can possibly do is to prevent men from acting wrongly when such action directly interferes with another's liberty, and appears in some outward conduct which cannot be mistaken. It is seen also, how far the law falls short in its processes, and how short a way it goes along with morality in the same journey. The one aims at doing right and making all human beings act rightly; but the law confines its powers only to preventing men from doing wrong, and that, where it is practicable to prevent it, and nothing more. It will be seen that the ancients had different ideas on this subject, for they confounded morality and law; and they ended by little advancing the one, and only showing the impotence of the other.

Perplexities of the ancients as to prostitutes.—The Mosaic law prohibited prostitutes from exercising their calling.[2] And it is said, that the Sanhedrim, finding no specific punishment awarded to it, decreed scourging as being the

[1] 30 & 31 Vic. c. 35, § 2.

[2] Deut. xxiii. 17.

common law punishment of that day.[1] And a parent who suffered a daughter to be a prostitute was also scourged.[2] By the laws of Zoroaster, where a woman was guilty of unchastity, the guardian was held responsible, and suffered punishment at the same time.[3] In many ancient and savage tribes the virtue of chastity is wholly unknown, and in too many cases is deemed even a demerit.[4] The Incas of Peru treated prostitutes as infamous, denied them a name, prohibited a respectable woman to speak to them, and ordered them to confine themselves to a limited quarter of the town.[5] In Japan the same class was tolerated under restrictions.[6] And in China they were ordered to live without the city, in houses appointed.[7] The laws of Charondas of Thurium made it a penal offence either to speak with, or associate with, dissolute persons.[8] And Solon prohibited those who did so from speaking in the assemblies of the people.[9] The Athenians also prohibited such women from wearing gold or ornaments.[10] And, in case of overdressing, Solon's laws allowed any one to tear the dresses off their backs and beat them besides.[11] They were separately taxed by the state. If a parent found his daughter had been dishonoured, he could sell her into slavery.[12] The Roman law did not interfere with prostitutes, if they registered themselves with the ædile.[13] But women of rank having sometimes registered themselves, it was further ordered, that none

[1] Selden, Ux. Heb. b. iii. c. 12; De Jure, b. 5, c. 4. [2] Levit. xix. 29. [3] Zend Avesta.

[4] The account given by Herodotus of the Lydian and Babylonian and Thracian women, who were by law compelled to disregard chastity, is found to be often paralleled in the customs (which are the laws) of modern barbarians.—*Herod.* b. i. b. v. The Cyprians were noticeable.—*Justin* b. xviii. The ancient Indians of Peru.—*Com. of Incas*, b. ii. c. 19. The Kaffirs esteem unchastity a merit.—*Maclean's Kaffirs*, 63. Also the New Zealanders.—*Taylor's New Zeal.* 167. So in Arrakan.—3 *Univ. Mod. Hist.* 229. And on the Gold Coast.—6 *Ibid.* 685. Likewise the Koringas of the Pacific, the Columbian and Californian Indians.—1 *Bancroft*, *Nat. Rac.* 81, 218, 415 Herodotus noticed the same of the Gandenes.—*Herod.* b. iv. So in Loango.—6 *Univ. Mod. Hist.* 540.

[5] Com. of Incas, b. iv. c. 14. [6] 7 Pink. Voy. 628. [7] 3 Univ. Mod. Hist. 580. [8] Diod. Sic. b. xii. [9] Ibid. [10] Hermog. Rhet. § 4. [11] Plut. Sol. [12] Ibid. [13] Tacit. Ann. b. ii. c. 85.

should be qualified to be registered, whose grandfather, father, or husband was a Roman knight.[1] They were confined to a particular dress;[2] and could be expelled from a particular neighbourhood;[3] and were prohibited from frequenting public theatres.[4] They were deprived of the dignity of litters.[5] They were inadmissible as witnesses.[6] In some cases they could not inherit, and the father could also disinherit them.[7] And a reason given for such a woman not inheriting was, that if her parents had wilfully or negligently prevented her marrying till twenty-five, they were to blame.[8] And a parent, who caused his daughter to be a prostitute, was scourged, as in the Jewish law.[9] The laws of the Wisigoths punished prostitutes with scourging and banishment.[10] So did the Koran.[11] The capitularies of Charlemagne did the same.

Law in England as to prostitutes.—The ancient laws of this country followed in a similar track. The laws of King Alfred, Ethelred and Cnut imposed scourging and banishment on prostitutes.[12] In the time of Edward I. the dress of courtesans, and even their haunts, were several times limited by proclamation, and also prescribed by the bye-laws of the City of London.[13] King Edward III. expressly ordered the removal of these women from living near the Carmelite friars' house in Fleet Street, so that the friars might not be interfered with.[14] It was once a duty imposed on constables to arrest all night-walkers on suspicion, and keep them in prison till the next assizes.[15] Hollinshed says, they were often dragged at the tail of a boat from one side of the Thames to the other.[16] And during the Commonwealth the legislature went the length of punishing acts of incontinence with three months' imprisonment.[17]

Our modern law has long settled into the state of letting these women alone. They are neither restricted in their dress nor prohibited from riding in carriages; nor do they

[1] Tacit. Ann. b. ii. c. 85. [2] Rosinus, Ant. Rom. b. v. c. 32. [3] Boerii Cons. 4 n, 54. [4] Alex. ab. Alex. b. v. c. 16. [5] Suet. Dom. [6] ff. De. Testib. 22, 3, 3. [7] ff. si a parente, 37, 12, 3; Justin. Inst. b. ii. t. 18. [8] Auth. Coll. 8, tit. 16. [9] Cod. 2, 40, 6, *de spect.* [10] Wisig. Leg. b. iii. tit. 4, § 17. [11] c. 24. [12] Anct. Laws of Eng. [13] Lib. Alb. Riley Pref. 52; Ibid. b. iii. p. 2. [14] 3 Inst. 205. [15] 13 Ed. I. Winch.; 5 Ed. III. c. 14. [16] 1 Hollinsh. 185. [17] Scobell's Acts, P. ii. p. 121 (A.D. 1650).

pay a tax to the state; nor are they disqualified to inherit; nor are they compelled to live in a particular quarter; nor are they liable to be arrested any more than others, unless charged with crime or debt. They cannot be sold into slavery; they cannot be dragged at the cart's tail; they are not prohibited from entering theatres. They are only expelled, in some cases of glaring misconduct and interference, from public houses and some shops; and are liable to be arrested in the large towns, if molesting unduly the passengers. But in these last particulars they are not worse treated than others would be, if molesting their neighbours to a like extent. It is true, that many of the contracts entered into by prostitutes, and the object of which is the furtherance of their calling, will be vitiated by this consideration; and the courts will refuse to enforce them either at their instance or at the instance of the other parties; but these qualifications belong properly to other heads of the law, such as "Contracts."[1]

Compulsory cure of contagious diseases of women.—In one respect only has the law, and that in very recent times, actively interfered with prostitutes, by compulsorily insisting on their being cured of disease, when that disease is injurious to those with whom they associate. But the legislature has made this law only applicable to a few localities, namely, those frequented most usually by the military classes. The statutes which have introduced this compulsion are known as the Contagious Diseases Acts for Women.

Contagious diseases of women and arrest on that ground.—The extent to which the law applies this compulsory process to certain women is as follows:—The person, who puts the law in motion, is the superintendent of police, and the woman who is liable to summary arrest on his information is any one, who is, or who is for good cause suspected by the superintendent of police to be, a common prostitute, and who resides in the place or within ten miles of it, or, having no settled abode, has been for purposes of prostitution within the limits, or in the company of men who do reside within the limits.[2] The information must be on oath, and a justice of the peace may issue a notice

[1] Pearce v Brooks, L. R., 1 Exch. 213; Smith v White, L. R., 1 Eq. 626. [2] 32 & 33 Vic. c. 96, § 4.

to such woman requiring her to appear before him at a specified time and place.[1] Whether the woman thus served with notice appears or not before the justice, he may, on the matter being substantiated by oath, make an order that she shall be subject to a periodical medical examination for a period not exceeding one year, and the first time and place shall be specified.[2] Or the woman may voluntarily submit to such examination, in which case the justice's order is dispensed with.[3] If the woman attend, she may be detained for five days, if she cannot properly be examined before that time.[4] If on examination she is found to suffer from disease, then she may, under the surgeon's certificate, be arrested and detained in a certified hospital for a period not exceeding three months; but if the medical officer and visitor certify a necessity, this period may be extended to nine months.[5] If the woman considers herself entitled to be discharged when the medical officer of the hospital thinks otherwise, she may apply to a justice of the peace, who, on reasonable evidence that she is free from a contagious disease, may then discharge her.[6]

Compulsory examination of prostitutes.—Whenever a justice of the peace has ordered the woman to attend a periodical medical examination, and she refuses or neglects to attend, or quits the hospital without a discharge, or refuses to conform to the hospital regulations, she is liable to imprisonment for one month, and in future like offences for three months. She may also, on quitting the hospital without a discharge, be arrested by any constable.[7] And when her imprisonment for the above offence is completed she may be again sent to the certified hospital under the original order or certificate.[8] If the woman acts as a prostitute after leaving a certified hospital, though suffering from disease, she may be summoned before justices and punished with imprisonment from one to three months.[9] If a woman, who has been subjected to an order for periodical examination, wishes to be relieved, she must apply to a justice and satisfy him, that she has ceased to be a common prostitute, or on entering into her recognisance

[1] 32 & 33 Vic. c. 96, § 4. [2] 29 Vic. c. 35, § 16. [3] Ibid. § 17; 32 & 33 Vic. c. 96, § 5. [4] 32 & 33 Vic. c. 96, § 3. [5] 29 Vic. c. 35, § 24; 32 & 33 Vic. c. 96, § 7. [6] 29 Vic. c. 35, § 25. [7] Ibid. § 28. [8] Ibid. § 30. [9] Ibid. § 31.

for good behaviour, she may be relieved accordingly.[1] Or she may obtain a like relief by application merely to the visiting surgeon.[2] Not only is a woman liable herself to be dealt with in this manner, but any occupier of a house or room which the woman frequents for purposes of prostitution, and while she is affected with a contagious disease, may, on summary conviction, be fined twenty pounds or imprisoned for six months with hard labour for suffering such woman to resort to the house.[3] Though the proceedings before justices in carrying out these acts are not materially different from those usual in other cases, yet the room where the justices sit is not deemed an open court; and hence the examination is private, unless the woman herself desires it to be otherwise, for if she prefers it the place will be accessible to the public.[4]

Ancient punishment for keeping disorderly houses.—The keepers of disorderly houses for prostitution have usually been selected for some kind of punishment. The Mosaic laws imposed scourging as the punishment for this offence.[5] The Greeks in some places caused procuresses to be tied in a sack and thrown into the sea.[6] The Roman law subjected procuresses to banishment, and sometimes to death.[7] And keepers of houses of ill-fame were subject to a special tax, and they were also subject to disabilities, such as the incapacity to be a witness, to make a will, to inherit or receive a legacy, or to enjoy the rights of parents and masters.[8] At a later period of the Roman law they were punished with corporal pains and banishment by Theodosius, Valentinian, and Justinian. In the legislation of the first Christian emperors purity was the most important of all the virtues, and panders were condemned to have molten lead poured down their throats. In the case of rape, not only the ravisher, but even the injured person, if she consented, was deemed fit only to be put to death.[9] Among the early Christians the procurers of prostitution were dealt with as severely as in case of adultery, and subjected to capital punishment by drowning in a sack or burning alive. Theodosius destroyed all infamous houses in Rome,

[1] 29 Vic. c. 35, § 34. [2] 32 & 33 Vic. c. 96, § 9. [3] 29 Vic. c. 35, § 30. [4] Ibid. § 37. [5] Deut. xxiii. 17. [6] Athen. b. x. c. 12; Æsch. Tim. 289. [7] Auth. Coll. iii. tit. 1; Lamprid. A. Sev. [8] Menochius de Arb. 534. [9] Cod. Theod. lib. ix. tit. 24.

and Theodosius Junior, at Constantinople, did the same, and ordered panders to be publicly whipped and expelled the city.[1]

Offence of keeping disorderly houses.—Though a person cannot be punished criminally or civilly for soliciting chastity or for committing, or indirectly assisting others in committing, acts of fornication, where no violence has been used and no rights of marriage are in question, it is nevertheless a punishable offence for persons to conspire to persuade a woman to become a common prostitute.[2] And it is also an indictable offence to keep a disorderly house for promoting prostitution. The law, as already stated, does not view the mere solicitation of chastity by one person as an indictable offence, and hence an indictment of a woman for being a common bawd cannot be sustained.[3] The reason given by the elder judges is, that it was a spiritual offence and dealt with by the Church. But the real reason is, that the law cannot undertake to enforce all the rules of morality, and must draw the line at some point.

Mode of punishing keepers of disorderly houses.—The law having from ancient times viewed a disorderly house as a common nuisance, and punished the keeping of such a house as a misdemeanour with fine and imprisonment, it has apparently been found in practice to be very difficult to secure a prosecutor for such offences. Thus the statute, 25 George II. c. 36, which is still in force, practically makes it compulsory on the overseers to prosecute, and gives informers a small reward for setting the procedure in motion. By that statute, any two inhabitants of the parish paying taxes, may give notice to a constable and to the overseers; and on their going before a justice and satisfying him of the existence of the house, they are to be bound by recognisance to prosecute at the next assizes or quarter sessions for the county or borough.[4] The overseers are bound under a penalty to pay the expenses of the prosecution, and a sum of ten pounds besides to each of the informers; and if the overseers fail to prosecute, the constable is bound to do so. Notice is to be given to the overseers to attend

[1] Theod. Novel. 18. [2] See *ante*, p. 375. [3] R. *v* Pierson, 1 Salk. 382; 2 L. Raym. 1197. [4] R. *v* Charles, 9 Cox, C. C. 18.

before the justices.[1] The machinery of these acts is merely devised to stimulate prosecutions, and if the prosecutor remove the proceeding to the Central Criminal Court, the provisions of the acts as to costs cease to apply.[2] And the informer must sue for his ten pounds the overseer in office at the time when final sentence is pronounced.[3] When the information has been laid against the keeper of the house, such keeper may be arrested and bound over to appear at the trial, and in the mean time, until the indictment, must give security for good behaviour.[4]

With regard to those who are liable to be proceeded against for keeping a house of ill-fame, not only the person, who is really the occupier of the house, but also any one, who behaves as the master or mistress, is equally amenable to punishment.[5] And a woman, who hires or occupies a single room in a house for the purpose of prostitution, is said to keep such house, so as to be punishable, whether she is a married woman or not.[6] But the fact of a woman keeping a house for the purpose of her own prostitution does not come within the enactment; it must be kept for the habitual reception of men and women generally.[7] It is of no consequence, however, whether any visible external indecency can be proved; it is enough, that men and women are seen constantly meeting there.[8] But a landlord of a house, the tenants of which keep it as disorderly to his knowledge, and could be got rid of by him on giving notice, is not himself indictable, either as principal or as an abettor, for letting the house as such, so long as he occupies no part of it himself.[9] Yet where the occupier keeps out of the way, and manages the house by means of servants, these can be convicted of aiding and abetting such occupier in committing the offence.[10] The judgment for keeping a brothel is fine and imprisonment, and with or without hard labour.[11]

1 58 Geo. III. c. 70, § 7. 2 R. v Sanders, 9 Q. B. 235. 3 Burgess v Bretefour, 7 M. & G. 481. 4 25 Geo. II. c. 36, § 6. 5 Ibid. § 8. 6 R v Pierson, 1 Salk. 382; R. v Williams, 1 Salk. 384. 7 Marks v Benjamin, 5 M. & W. 565. 8 R. v Rice, L. R., 1 C. C. R. 21. 9 R. v Barrett, 1 L. & C. 263; R. v Stannard, 1 L. & C. 349. 10 Wilson v Stewart, 3 B. & S. 913. 11 3 Geo. IV. c. 114.

Offence of harbouring prostitutes, and power to arrest.—There is no specific offence of harbouring prostitutes except in public houses, where, if they are allowed to make the house a habitual resort and place of meeting, or to remain longer than is necessary for the purpose of reasonable refreshment, the occupier of the licensed house incurs a penalty of ten pounds.[1] The Vagrant Act also punishes with one month's imprisonment prostitutes wandering in public places, and behaving in a riotous and indecent manner; and they may be arrested by a constable without a warrant.[2] Such is the only general law extending all over the kingdom, and which puts the chief restrictions on prostitutes. It is true there are somewhat more stringent laws in the large towns. In the metropolitan police district, the keepers of all shops, where provisions or refreshments of any kind are sold, if prostitutes are knowingly suffered to meet and remain therein, are fined.[3] And within the same police district a constable may arrest, without warrant, every common prostitute or night-walker, who is in any public place for the purpose of prostitution or solicitation, to the annoyance of the inhabitants or passengers; and she may be fined or imprisoned.[4] In those large towns which have adopted the Towns Police Clauses Act, a similar enactment exists as to public houses and shops.[5] And the constable, under the same statute, may arrest without warrant any common prostitute or night-walker loitering or importuning passengers for the purpose of prostitution, and she may be fined or imprisoned.[6] This last statute has been incorporated in the local laws of most of the large towns; and, if it has not been so, this will be found to arise from the fact that there are already local statutes governing the locality, which contain similar provisions.

Employing women in unfit trades and occupations.—A few restrictions, not connected with immorality, remain to be noticed, bearing on women. Women are altogether prohibited and sometimes restricted from certain occupations; as for example, in factories and mines. In other cases they are often practically prohibited by reason of their not being able to qualify themselves under the rules

[1] 35 & 36 Vic. c. 94, § 14. [2] 5 Geo. IV. c. 83, § 3. [3] 2 & 3 Vic. c. 47, § 44. [4] Ibid. § 54. [5] 10 & 11 Vic. c. 89, § 35. [6] Ibid. § 28.

or conditions applicable. In factories women are, from reasons of health, restricted as to the hours of work, in a manner similar to young persons.[1] In mines, they are prohibited from working underground;[2] and above ground their hours are restricted also.[3] And it is the same as regards metalliferous mines.[4] And in agricultural gangs women cannot be employed in gangs with or under men.[5] In all other employments women may engage as well as men, there being no distinction in point of law, however usage may introduce modifications.

Punishments of women.—The punishments of women are now the same as those for men, except that whipping of females is not allowed in any circumstances. For centuries women used to be burnt instead of being hanged; but that invidious distinction was put an end to in the last century.[6] The application of benefit of clergy has been already noticed. As regards crimes committed by women, the only material distinction is caused by the case of married women; but all that pertains to variations caused by marriage belongs more properly to the division of the law intituled "Marriage." One other matter alone may be noticed as peculiar to the punishment of women, namely, that when a female prisoner was sentenced to death, her pregnancy was deemed, in the Roman law and the earliest records of our own law, a good cause for staying the sentence.[7] Blackstone notices a glaring case of violation of this rule in the time of Queen Mary, where in disregard of the condition of the woman, a child was actually born in the flames which were devouring the mother.[8] Whenever a prisoner condemned to death alleged her condition of pregnancy, a jury of twelve matrons used to be impanelled to try the truth of her statement, and on their verdict she was reprieved till after the birth of the child; and the court may equally well and more expeditiously satisfy itself on the report of a medical man as to the same matter.

[1] 7 & 8 Vic. c. 15; 13 & 14 Vic. c. 54; 37 & 38 Vic. c. 44.
[2] 35 & 36 Vic. c. 76, § 4. [3] Ibid. § 12. [4] Ibid. c. 77, § 4.
[5] 30 & 31 Vic. c. 130. [6] See *ante*, p. 292. [7] Fleta, b. i. c. 38.
[8] 1 Hale, P. C. 369; 4 Bl. Com. 359.

CHAPTER XI.

VARIATIONS IN RIGHTS CAUSED BY INSANITY AND DEFECTIVE UNDERSTANDING.

Variations of laws caused by insanity or the want of a controlling mind.—Insanity is one of the most marked of the causes of variations in the laws affecting persons, for it may be predicated of each individual at all times, that he or she either is or is not insane. And when insanity exists, the better part of the human being is left out, for a body without the inhabiting mind is of little use, and can in no sense whatever hold its own in the business of life. And yet this untenanted body is not a cipher, but being in semblance a human being, is entitled to all the protection which the law affords to the bodies of human creatures, who are possessed of a soul and a reasoning mind, able and ready at all times to guide and protect that body against most of the minor wrongs and dangers. An insane person differs from a sane person in this, that the former is deemed in the eye of the law unable to take care of himself; and therefore his rights and wrongs must be, so to speak, delegated to another, and dealt with more or less through the medium of some representative or keeper, appointed for the occasion by a court or a third party. As to what is done with the property of the lunatic, that subject belongs to the division of the law intituled "Property;" what is here to be noticed, is only the kind of care and protection given by the law to the body of the lunatic—into whose custody such body is consigned—what kind of treatment is assigned to it—what security there is, that such treatment shall be fair and humane, so that every justice shall be done to such body, while it exists. All this requires to be noticed here, because the

state of insanity makes so great a difference in the self-regulating power of the normal man, that special laws must be made for this case alone. And while everything material must be said relating to insanity and the body of the insane person, the proper place is also here to be found for treating of that other more evanescent and self-produced insanity called drunkenness—a state also in which there is a body found lying helpless without any informing soul for the time being, and, as to the care and punishment of which, laws cannot help making some special provision.

If lunacy or idiocy can be defined.—No legislature and no court has been able to define insanity any more than it can define common sense; and insanity may be said to be nothing else than a total, or nearly total, negation of common sense; and this want displays itself at every turn and on every occasion in human existence. But though every one instinctively recognises this total want, and can take its measure very accurately, nobody can put the *rationale* of its detection into words, though this has often been tried under various specious disguises. What the distinguishing characteristic is, which is wanting, can be felt and seen and heard; but it is idle and vain to define it correctly. The nearest approach to tracing it is merely to say, that whatever any twelve men, taken from the crowd, and after being told all that can be told about the sayings and doings of the lunatic, will agree in describing as lunacy, then that is lunacy. And no oracle of the law has ever done more than merely to vary by a few words or phrases that which cannot be explained.

The usual course has been to use a periphrasis of language more or less descriptive, but not making the insoluble problem any clearer. Some say, it is not every kind of frantic humour or unaccountable turn in a man's actions, that makes him a madman. The test is, whether he can distinguish good and evil, and knows what he does; or whether he knows no more than an infant, or brute, or wild beast.[1] Others say, a lunatic is a person of unsound mind; that he labours under melancholy distempers, and hath ordinarily no more understanding than a child of fourteen; that he entertains delusions which exist only in

[1] Hadfield's Case, 16 St. Tr. 765.

his own imagination; that he believes in delusions which no rational person would believe; that he believes in an absurdity which he cannot perceive, and out of which he cannot be reasoned. Others say, with Fitzherbert, that an idiot, that is to say, a born lunatic, is one, who from his birth cannot count twenty pence or tell who his father or mother is or was. Others say, with Lord Tenterden, that he is one, who cannot repeat the letters of the alphabet, or read what is set before him. Coke says, that *non compos mentis* is the most legal name of all.[1] Hale says, idiocy is fatuity. Others again say, an idiot cannot count his five fingers, and so forth. Again it is said, that the test is, if at any particular moment, he does what in a sane adult would be deemed a crime, whether the lunatic knew he was then doing wrong, or knew he was doing what the law of the land forbids, and so forth; or whether he acted under some delusion. All these attempts at defining insanity seem only to end in substituting several words for one word, without adding any further insight into the thing defined.

Some maxims and distinctions as to idiots and lunatics.— It is usual to distinguish those suffering from defective intelligence into idiots, lunatics, and persons of unsound mind. An idiot is one, who from birth, owing to some incurable infirmity, is incapable of exercising a normal judgment in human affairs. A lunatic is one, who, at intervals, called lucid intervals, exercises or has exercised a normal judgment in human affairs, and at other times not. A person of unsound mind is one who has lucid intervals, but whose unsoundness is more transient than that of a lunatic, and yet is distinguishable from mere weakness of mind. And the unsoundness may exist only on one subject, and the mind may be sound on other subjects. A lucid interval presupposes lunacy or unsoundness of mind, and is a temporary suspension of the unsound state. But it does not imply, that the mind has recovered its entire original strength. As a lucid interval implies, that insanity had been previously established, and thereby that the presumption of sanity had been reversed, the presumption of insanity thus fixed continues, until it be displaced by proof of the fact of a lucid interval. It is

[1] 1 Inst. 246.

therefore incumbent on those, who allege a lucid interval, to prove it. The legal presumption is, that every person is sane, until the contrary is proved. This presumption does not vary, though the person has been born deaf, dumb, and blind. Idiocy is usually self-evident *ex facie*, and therefore is most satisfactorily proved by personal examination of the party's looks, coupled with his conduct. Want of the arithmetical faculty, and generally of a faculty for the business of daily life, is strong *primâ facie* evidence of idiocy. Lunacy is proved by the conduct of the party at various times being flagrantly contradictory to that of a reasonable person in the same circumstances, or of himself when admittedly sane, as, for example, the belief of facts, which are not facts, or which no reasonable person would for a moment believe. Conduct importing lunacy is to be distinguished from conduct importing mere eccentricity, for eccentricity implies to some extent a consciousness that the conduct is eccentric. Eccentricity is generally an ingredient in lunacy; and, when chronic and continuous, it is very difficult to distinguish it from lunacy. Rational conduct does not *per se* disprove insanity, for the insanity may consist in delusions on points not involved in or developed in such conduct. And, as will be seen in the case of wills and testaments, a testator may be treated as sane in reference to his testamentary capacity, while he may be haunted with insane delusions on other matters not affecting that special or disposing faculty.[1] Many ambiguous acts, though not *per se* evidence of insanity, are ingredients of proof when coupled with other facts.

At common law the acts of the party during the whole antecedent period of life were admissible in evidence of insanity. But by statute, in lunacy inquiries, such evidence must now be confined to a period of two years preceding the alleged time of lunacy.[2] And evidence of the insanity of the lunatic's parents is admissible evidence of his own insanity; but evidence of insanity of his collateral relations is not so admissible. Declarations of the alleged lunatic, when grossly contradictory of declarations made by him when he was clearly sane, are admissible evidence of lunacy, unless when explained by other facts.

[1] Banks *v* Goodfellow, L. R., 5 Q. B. 549. [2] 25 & 26 Vic. c. 86, § 3.

Opinions of third parties, or professional witnesses, obtained *ex parte*, as to the sanity of A, though admissible, are weak evidence compared with the facts and conduct which speak for themselves.[1] And the opinions of medical experts ought not to be admitted, unless founded on personal examination of the alleged lunatic.[2] A lucid interval must be proved by acts of sanity, as clear as the acts which proved the previous insanity; for the presumption is, that insanity continues till the contrary is proved.[3] The acts relied on must be not merely consistent with sanity, but inconsistent with insanity.[4] If the lucid interval is short, the evidence must be all the stronger; and less evidence will be required of a lucid interval occurring in a delirium than in a permanent form of insanity.[5] These are the leading maxims, which have usually passed current as the result of dealing with inquiries into the lunacy or sanity of individuals.

General change of treatment of insane persons.—No lunatic asylum seems to have existed in antiquity, nor in Christian Europe till the fifteenth century, when one was established in Spain, about eighty years before other countries adopted it.[6] The Mahommedans, in this form of charity, are said to have anticipated the Christians.[7] In most countries the condition of the insane was lamentable, some being burnt as witches, and all subjected to the harshest tortures. It was not until the eighteenth century that the association of insanity with witchcraft was dissolved, and Morgagni in Italy, Cullen in Scotland, and Pinel in France, instructed public opinion in more humane and effective modes of treatment.[8] Owing to some abuse of their trust by the tutors of the insane, a statute of Edward I. in 1272, gave the charge and custody to the king, which was confirmed by the statute of Edward II.[9] The object, however, clearly appeared to be the preservation of the lands and tenements from waste, and the mere aliment rather than the personal comfort and cure of the lunatic owner. In 1547, Henry VIII. presented a dissolved monas-

[1] Re Dyce Sombre, 1 Mac. & G. 128. [2] Macnaughten's Case, 8 Scott, N. R. 600; 10 Cl. & F. 208. [3] Re Holylands, 11 Ves. 10. [4] Hall *v* Warren, 9 Ves. 610. [5] Groom *v* Thomas, 2 Hagg. Ec. 433. [6] 2 Lecky, Hist. Mor. 94. [7] Desmaisons, Des Asiles. [8] 2 Lecky, Hist. Mor. 96. [9] 17 Ed. II. De Prerogativa Regis.

tery, called by the name of St. Mary of Bethlehem, to the City of London, as a residence for lunatics, and some systematic treatment of this affliction began, and in course of time attracted notice and imitation.

Care of lunatics at common law.—At common law no machinery was provided for taking care of lunatics or idiots, except so far as they were parties to an action. In courts of equity, besides taking similar care of one *non compos* who is party to a suit, if he has property, the court will appoint a committee to take care of both the person and the property. It is true that, though the common law had no positive provisions for the care of lunatics, yet it recognised a certain duty in those, who voluntarily assumed such care, to treat them with humanity. Hence, where a person voluntarily took charge of his lunatic brother, and grossly ill-treated or starved him, he was deemed guilty of a misdemeanour.[1] The defects of the common law have, after great delay, been remedied by many statutes, which create a machinery for securing that proper care be taken of persons *non compotes*, whether possessed of property or not. This machinery consists in enforcing provisions, that houses for the reception of such persons shall be kept by proper parties, subject to official inspection, and that their detention, condition, and treatment shall be under surveillance.[2]

Modern English legislation as to lunatics.—The first statute, in 1744, regarding lunatics gave two justices power to issue their warrant to lock up and chain the insane person, and apply his property for his maintenance; and this machinery was often made use of to get rid of obnoxious relatives. It was not till 1774 that the first act was passed to enforce some regulations as to madhouses; and this consisted in appointing commissioners to grant licences for keeping such houses, and to inspect these houses when kept. No proper security, however, was provided against the admission of improper persons, and against cruel and violent treatment, such as precluded all hope of recovery. At length, in 1853 and 1862, statutes were passed, which involved a matured scheme, directed chiefly towards appointing impartial public officers, called commissioners, to watch constantly over the breach of the rules, to allow only

[1] R. *v* Porter, 1 L. & C. 394. [2] 8 & 9 Vic. c. 100; 16 & 17 Vic. c. 96; 18 & 19 Vic. c. 105; 25 & 26 Vic. c. 86, c. 111.

licensed persons to take lunatics in charge, and to see that the opinions of two qualified physicians are given as the initiative for arresting and detaining the lunatic; ample powers being reserved to allow the lunatic on his restoration to be released, and to be humanely treated during his captivity.[1]

Under the system of official vigilance now in force, it appears that more than two persons in 1,000 of the population are insane; and about one-tenth are cured or curable. Nearly eight-ninths of the lunatics are paupers, and rather more of them females than males.

Licences for keeping lunatics.—The commissioners in lunacy are the authorities who grant licences to keep a house for the reception of lunatics within a certain metropolitan district.[2] Beyond that district, the justices of the county or borough have like powers to grant licences.[3] And the justices at quarter sessions are to appoint a committee of their number and a medical man to act as visitors of the licensed houses in their county or borough, and also a clerk to such visitors, their names to be duly published. The commissioners in lunacy and the visitors and officers are not allowed to be interested in any licensed house; and a penalty is provided for that offence.[4] A party applying for a licence must give due notice and particulars of his own name and that of the superintendent, and plan and size of premises, with their accommodation; and no alteration must be made afterwards, except with the consent of commissioners or visitors; and to misstate such particulars is a misdemeanour.[5] The licence lasts for thirteen months. A rigorous watchfulness is thus kept on houses used for the maintenance of lunatics; and it is a misdemeanour to receive lunatics, if more than one, without a licence.[6] Not only is a licence requisite, but there must be a record kept of all the admissions, visits, and chief events relating to the condition of the patients.[7] And notice of each event must be given to the commissioners in lunacy.[8]

Control over keepers of licensed houses.—The statutes

[1] 16 & 17 Vic. c. 70; c. 96; c. 97; 25 & 26 Vic. c. 86
[2] 8 & 9 Vic. c. 100; 16 & 17 Vic. c. 96: 25 & 26 Vic. c. 111.
[3] 8 & 9 Vic. c. 100, § 17. [4] Ibid. § 23. [5] Ibid. § 24 *et seq.*
[6] Ibid. § 44. [7] Ibid. § 50. [8] Ibid. §§ 50-55.

further provide that the licensed person, or one of them, if there are partners, must reside on the licensed premises;[1] or at least the physician residing or visiting the house shall be approved by the commissioners.[2] The licensee cannot receive more patients than the licence specifies, though with the consent of the commissioners or visitors, he may receive a boarder, who has been already under treatment elsewhere.[3] A hospital for keeping lunatics requires to be registered, and to have a resident medical attendant.[4] And in like manner a resident medical attendant is required in any licensed house having one hundred patients.[5] Where the house has fewer patients, and is not superintended by a medical man, visits by a medical man are required, which vary in frequency with the number of patients.[6] In addition to these visits by day, the commissioners and visitors have power also to visit any of the licensed houses or hospitals during any hour of the night. But in the case of the visitors, this power is confined to licensed houses in their own district.[7] And as a guarantee of the competency and care of attendants, a list of the names, ages, and previous character, and remuneration of all persons employed in asylums must be forwarded to the commissioners; and when discharged for misconduct, the reason is to be stated.[8] The commissioners keep a register of these particulars relating to all attendants; and allow the same to be inspected by all proprietors of licensed houses. It is a misdemeanour for any superintendent or attendant in a registered hospital, or licensed or single unlicensed house, to illtreat or wilfully neglect a patient; and he may be punished by indictment or summary conviction.[9] Any patient, who has been discharged from a licensed house or hospital, and who considers himself to have been unjustly confined, can apply to the commissioners for a copy of the order and medical certificates on which he was detained; and if the commissioners think he was unjustly confined or ill-treated, the Home Secretary may direct a prosecution on the part of the crown.[10]

Access and visits to confined lunatics.—When any person

1 16 & 17 Vic. c. 96, § 2. 2 25 & 26 Vic. c. 111, § 16. 3 Ibid. § 18. 4 8 & 9 Vic. c. 100, § 43. 5 Ibid. § 57. 6 Ibid. 7 Ibid. § 71. 8 16 & 17 Vic. c. 96, § 26. 9 8 & 9 Vic. c. 100, § 56; 16 & 17 Vic. c. 96, § 9. 10 8 & 9 Vic. c. 100, § 56.

is interested in ascertaining, whether a particular patient is confined in a licensed house, the commissioners or visitors on application have a discretion to give such information; or they may on payment of a small fee direct a search through their books and records to ascertain the place of confinement.[1] Though in most private asylums the friends are allowed to visit the patient at any time, yet if access is refused, a commissioner or visitor may give an order of admission into any house, hospital, or other place except a gaol, and this order must be obeyed by the superintendent under a penalty of twenty pounds.[2] And the commissioners may in their discretion, at the request of the person who pays for the maintenance, allow the patient temporary leave of absence on trial under proper care, and if such absence is shown to be likely to be beneficial.[3] It is the duty of the commissioners to visit all licensed houses as well as asylums and hospitals in the metropolitan district, several times during each year; and they may visit licensed houses elsewhere also. These visits may be made at any moment during the daytime without notice, and every patient and part of the house must be seen, books examined if required, and full particulars ascertained as to the cause of any restraint that may be used. And the country visitors act in a similar manner in their own district.[4] And records are kept of all these visits. And for the proprietor or superintendent to misstate or conceal the state of facts is a misdemeanour.[5] The order for the discharge of a patient is surrounded with precautions, and no patient is allowed to be discharged if dangerous, unless the commissioners see good cause for discharging and removing such patient.[6] And two separate visits are made by the commissioners or visitors before finally resolving to sign the discharge.[7] If a single patient should be discharged, notice is to be given to the commissioners.[8] The visitors and commissioners have power even to regulate the dietary of the pauper patients in licensed houses; and the commissioners may also regulate the dietary of the pauper patients in a hospital.[9]

[1] 8 & 9 Vic. c. 100, §§ 83, 84. [2] Ibid. § 85. [3] Ibid. § 86; 25 & 26 Vic. c. 111, § 38. [4] 8 & 9 Vic. c. 100, §§ 61-69. [5] Ibid. [6] Ibid. § 75. [7] Ibid. §§ 77, 78. [8] 16 & 17 Vic. c. 96, § 21. [9] 8 & 9 Vic. c. 100, § 82.

Order of admission of lunatic patient:—Before a patient can be admitted into a licensed house or hospital, his case must be authenticated by the personal examination of two medical men, and a minute account of the symptoms is registered as well as a minute history of his whole treatment thereafter, each step and record being subject to the criticism of the commissioners. The order of admission of a patient must be signed by a relative, friend, or guardian, who has seen the patient at least within a month previous, and must mention the name of some relative;[1] and the medical certificates must be made by persons not interested in any licensed house, or connected by relationship or business with each other.[2] As a general rule, the person who signs the order of admission is responsible for the patient's maintenance, and he also can authorise the patient's discharge;[3] but if he is dead or incapacitated, then other relatives or friends in a certain order may exercise this power, and failing them, the commissioners.[4] This order should always specify the supposed cause of insanity, if known. If the case is urgent, and one medical certificate is procured, but any other cannot be procured, then two other medical certificates must be added within three days after the admission of the patient.[5] The medical men must be duly registered, and in actual practice, and must have seen the patient within seven days before. Each medical certificate is to set forth the opinion, and some specific facts as the grounds of that opinion as to the insanity, ascertained by independent examination of the patient.[6] This certificate must be acted on within seven days after its date. And it must clearly set forth two conclusions, namely, first, that the patient is of unsound mind; and secondly, that he is a proper person to be put under restraint. Some of the facts must be ascertained by the medical man from personal examination; the rest may be obtained from others who are entitled to credibility, and have had good means of observation. It is a fundamental rule, that "no person shall be received into any

[1] 25 & 26 Vic. c. 111, §§ 23, 25. [2] 8 & 9 Vic. c. 100, § 114; 16 & 17 Vic. c. 96, § 12; 25 & 26 Vic. c. 111. [3] 8 & 9 Vic. c. 100, § 72. [4] 8 & 9 Vic. c. 100, §§ 72, 73; 16 & 17 Vic. c. 97, §§ 19, 20; 25 & 26 Vic. c. 111, § 43. [5] 16 & 17 Vic. c. 96, § 5. [6] Ibid. § 10.

asylum, hospital, and licensed or unlicensed house, under any certificate which purports to be founded only on facts communicated by others."[1] If the medical certificate is defective, the commissioners have the power to order the patient's discharge, unless in fourteen days the requirements of the statutes be complied with.[2] But the certificate may, with the commissioners' sanction, be amended within fourteen days after the reception of the patient.[3] And as a guarantee of due care, the medical man, if carelessly or falsely certifying facts, is liable to an action at law. Moreover, if he sign a certificate contrary to the statutes, or sign it when he is not a duly qualified medical man, he commits a misdemeanour.[4] But though this particularity is required before the admission of patients into houses and asylums, when one has been already found a lunatic by inquisition, no such precaution is needed, and he may be received at once into any of the establishments.[5]

The lunatic's letters.—All letters written by patients in asylums, hospitals, or licensed houses, and addressed to the commissioners of lunacy must be forwarded unopened. Letters addressed to other persons must be forwarded to such persons unless the manager of the patient dissent, in which case the letters must be kept for the inspection of the commissioners or visitors at the next visitation, and any contravention of this provision subjects the offender to a fine of twenty pounds.[6]

Keeping a single lunatic gratuitously.—A person, who receives and takes care of a single lunatic patient gratuitously, requires no license; nor does he require any medical certificates, nor need he transmit notice to the commissioners in lunacy.[7] At the same time the Lord Chancellor or the Home Secretary may, by order in writing, authorise the commissioners in lunacy or any other person to visit and examine such lunatic, or supposed lunatic, and report the circumstances.[8] And by the same authority every place, where a lunatic or supposed lunatic is confined, may be visited and a report of the result made.[9]

Unlicensed houses for single lunatic.—A licence is only

[1] 16 & 17 Vic. c. 46, § 10. [2] 25 & 26 Vic. c. 111, § 27. [3] 16 & 17 Vic. c. 96, § 11. [4] Ibid. § 13. [5] 25 & 26 Vic. c. 111, § 22. [6] Ibid. § 40. [7] 8 & 9 Vic. c. 100, § 90. [8] Ibid. § 112. [9] Ibid. § 113; 16 & 17 Vic. c. 96, § 33.

required when more than one patient is kept. But if a private individual, for profit, agrees with the friends of a patient to take charge of him, then a statement of the reception of the patient, with full particulars as to his name and condition, must be forwarded to the commissioners in lunacy.[1] And the patient must be received with an order and two medical certificates.[2] This order must specify one or more of the relatives of the lunatic;[3] and the certificates must, as in other cases, be those of disinterested medical men.[4] The patient must be visited every fortnight, or, as directed by the commissioners, by a disinterested medical man, who did not sign the medical certificate.[5] There must be a medical visitation book kept at the house, in which entries are regularly made of those visits, and an annual report made to the commissioners.[6] And notice must be sent to the commissioners of the death, discharge, removal, escape, and recapture of a patient.[7] The committee of visitors may always, at all reasonable times, visit a private patient kept in an unlicensed house for profit, and inquire and report into his state, and report, if needful, to the Lord Chancellor, who may order the lunatic to be removed.[8] And the commissioners may in all cases, where they have reason to suspect that the property of a lunatic is not duly protected, report the matter to the Lord Chancellor, who will direct a master in lunacy personally to examine and report, and take necessary steps for managing the property.[9] In all the cases where a lunatic is under the charge of a proprietor of a licensed house, or the superintendent of a registered hospital, and complaint is made, it is a sufficient defence and justification to set forth the order and medical certificates.[10] And if the lunatic escape from his custody, the same credentials authorise him to recapture the lunatic within a fortnight.[11] Any transfer of the charge or removal

[1] 25 & 26 Vic. c. 111, §§ 28, 41. [2] 8 & 9 Vic. c. 100, § 90; 16 & 17 Vic. c. 96, §§ 4, 8. [3] 25 & 26 Vic. c. 111, § 25. [4] Ibid. § 24; 16 & 17 Vic. c. 9, § 12; 8 & 9 Vic. c. 100, § 114. [5] 8 & 9 Vic. c. 100, § 90; 16 & 17 Vic. c. 96, § 14. [6] Ibid.; 16 & 17 Vic. c. 96, § 16. [7] 8 & 9 Vic. c. 100, § 53, 54, 55, 90; 16 & 17 Vic. c. 96, § 21, 22. [8] 8 & 9 Vic. c. 100, § 92, 93. [9] Ibid. §§ 95, 96. [10] Ibid. § 99. [11] Ibid.; 25 & 26 Vic. c. 111, § 39.

for improvement of health, must be reported to and assented to by the commissioners; and any change of residence must also be reported to them.[1] And whoever contravenes the above directions, commits a misdemeanour.[2]

Lunatic found wandering.—Whenever a lunatic is found wandering at large, whether a pauper or not, or is cruelly treated by any relative, it is proper for a constable to take him before a justice, or give information, when the justice may make an order for the reception of such lunatic into an asylum, hospital, or registered house.[3]

Pauper lunatics.—When a pauper lunatic is found in any parish or union, it is the business of the medical officer to inform the relieving officer or overseer; and the latter, when so informed, or otherwise aware of it, must then take such pauper before a justice of the peace, who with some medical practitioner will examine his state. If satisfied by the medical certificate, embodying an opinion that the pauper is a lunatic, the justice may direct the pauper to be received into some asylum, hospital, or licensed house. And if the pauper is unable to be taken before a justice, the officiating clergyman and parish officer can jointly give a similar order.[4] If in such a case two medical certificates are produced to the justice, he has no alternative but to make out the order, and send the pauper to some convenient house. But the pauper may be detained in the workhouse and taken care of, if this course is not dangerous to the lunatic or to others, or if he is a chronic lunatic. And even the relatives, on guaranteeing that the pauper will be properly cared for, and not a burden to the parish, or union, or county, are allowed to take charge of him.[5] The expense of maintaining the pauper, when sent to the asylum, hospital, or registered house, is ultimately borne by his settlement parish, or union, and failing the discovery of any place of settlement, the expense falls on the county or borough where the pauper was found.[6] But the keeper of a licensed house or super-

[1] 16 & 17 Vic. c. 96, §§ 20, 22. [2] 8 & 9 Vic. c. 100, § 90. [3] 16 & 17 Vic. c. 97, § 68. [4] Ibid. § 67; Ibid. c. 96, § 7; 25 & 26 Vic. c. 111, § 19. [5] 25 & 26 Vic. c. 111, § 20; 4 & 5 Will. IV. c. 76, § 45; 30 & 31 Vic. c. 106, § 22; 31 & 32 Vic. c. 122, § 43. [6] 16 & 17 Vic. c. 97, §§ 98, 99; 25 & 26 Vic. c. 111, § 45.

intendent of a hospital is not bound to receive pauper inmates, except where they have contracted to do so, as these go to the county or borough asylum.[1] And in such cases the guardians of the parish or union can discharge the patient; and due notice must always be given to them of the state of the lunatic, and the commissioners in lunacy must also be informed of the case.

Chancery lunatics having property.—In ancient times the lunacy was ascertained by the king on a petition presented to the Lord Chancellor issuing a writ to the sheriff or escheator, to summon a jury and try the question. If the sheriff found he was *non compos*, the friends might still petition the Court of Chancery for a commission to try the matter again. And very early a distinction was drawn between a born idiot, and a lunatic who had merely become so after birth. The idiot was considered to be under the care of the lord of the fee, but the lunatic was committed to the care of the king. The mode of dealing with a case of alleged lunacy now varies according as his estate is estimated to be of the amount of 1,000*l.*, or of the income of 50*l.*, or is estimated to exceed that sum. And the Chancery Division has jurisdiction to make orders for the custody of a lunatic, who has not been so found by inquisition, though his property exceed 1,000*l.*; yet such order is not usually made if a commission is likely to be issued.[2] The procedure in such cases is for the relatives to present a petition to the Lord Chancellor, accompanied by affidavits, setting forth the lunacy with particulars of specific facts and the amount of the lunatic's property. The alleged lunatic must in all cases be served with notice and copy of the petition. And he may demand a jury.[3] The Lord Chancellor on such application, unless satisfied on personal examination that the lunatic has not sufficient understanding to form a wish on the subject, will direct the return of a jury and a trial before one of the masters in lunacy.[4] The Court of Chancery indeed has always a discretion to grant or refuse a trial by jury. And as a check upon such proceedings, the petitioner may be called on to pay all the costs. Though the petition may be presented by a stranger, yet in such a case it must be served

[1] 16 & 17 Vic. c. 97, § 78. [2] 25 & 26 Vic. c. 86, § 12; Vane *v* Vane, 45 L. J., Ch. 381. [3] 16 & 17 Vic. c. 70, § 40. [4] Ibid. § 41.

on the nearest relative, or the husband, or wife, if any. And in any case where the commissioners in lunacy report to the Lord Chancellor that the property of any alleged lunatic, who has not been found so by inquisition, is not duly protected or applied to his benefit, the Lord Chancellor may direct an inquiry, which resembles an ordinary inquisition *de lunatico inquirendo.*[1] In such inquiry the master in lunacy may himself hold the inquisition unless the alleged lunatic has demanded a jury, or the Lord Chancellor has ordered one, or the master considers one necessary. And when the verdict or finding is one of lunacy, the master on the same occasion inquires into the state of the property, and the relationship, the proper persons who should be appointed committees of the person and estate, and the proper income to be allowed for the lunatic's maintenance. The issue raised by the inquisition is, whether at the time of the inquisition the alleged lunatic is of unsound mind and incapable of managing his affairs. And no evidence is allowed, as already stated, to be given of anything said or done by the alleged lunatic more than two years previously, unless the judge or master otherwise direct. The place where this trial takes place, if any, is an open court. The alleged lunatic has a right to be present, and indeed his personal presence is part of the evidence; and he may be represented by counsel or solicitor, and cross-examine all witnesses brought against him. At the same time an inquiry may be held, though the alleged lunatic is abroad, for his property, if in this country, requires in that case to be dealt with and protected by some committee as much as in other cases. The main details as to the management of the person and estate of the lunatic, when the verdict or finding is one of lunacy, are settled by a report from the master in lunacy.

Appointing committee of lunatic's person.—In settling who are to be the committees of the lunatic, the usual rule is, that the heir-at-law is chosen as the committee of the estate, and the next of kin is chosen as the committee of the person, a preference being given to relatives over strangers. Each of these has certain duties incident to his appointment, for the sole object in respect to each is the benefit of the lunatic and the best management of the

[1] 16 & 17 Vic. c. 70, § 54.

property which belongs to him. The committee of the person, who does not require to give any security, sees to the personal care of the lunatic, appoints a residence and servants, giving close attention, and paying a certain number of periodical personal visits, which are fixed by the court, and rendering a yearly account of his expenditure to the master in lunacy, and also a half-yearly account to the visitors of lunatics of the bodily health of the lunatic. The committee places the lunatic in a licensed house, or a private house, according to the income allowed. But if a private house is selected, no medical certificates nor fortnightly medical visitations are required, as in ordinary cases of single patients, for the committee is an officer of the court, and is presumed to see that proper attentions are secured. The committee must also notify any change of residence, and give the board of visitors the name of the medical attendant of the lunatic. In all other particulars the authority of the committee is absolute, and he can dictate what friends and visitors are to be allowed to see the lunatic, and on what conditions. The committee of the lunatic's estate acts very much in the same manner as the owner, except that he is in most respects only a trustee, and must keep accounts and turn everything to good advantage. He must obtain the consent of the Lord Chancellor or Master in Lunacy to every act out of the ordinary course of management, such as rebuilding houses, executing deeds, or changing investments. He collects rents, pays servants, lets the property, and represents the lunatic in courts of law or equity. There is, however, one act of representation not permitted to him, for if the lunatic has a right of presentation to a vacant benefice, this is exercised for him not by the committee, but by the Lord Chancellor. And lastly, a committee of a lunatic's estate or person is not allowed to retire from the office, except with the permission of the Lord Chancellor, after the report of the master on the propriety of the step. If permitted to retire, then a new committee is appointed as before. But the committee is not allowed any salary for his trouble, and is not to make gain of the matter.[1] He is a mere bailiff, and has no other interest than to manage the matter carefully. If the lunatic die,

[1] Re French, L. R., 3 Ch. Ap. 317.

these accounts are made up, and papers handed over after the inquiry by the master.

Where lunatic's income less than fifty pounds a year.—If the property of the lunatic is less than £1,000, or his income is less than fifty pounds a year, the procedure is less elaborate and expensive. The alleged lunatic must be served with notice of the petition. But the Lord Chancellor may dispense with an inquiry if the facts can be satisfactorily established by affidavit as to the insanity and the amount of property; and he may direct how the lunatic's person and property are to be disposed of.[1] If a chancery lunatic is put in an unlicensed house for profit, under the care of some other than the committee, then such person is subject to the same responsibilities as in the case of a single private patient, and the patient is subject to the visitation of the commissioners in lunacy, as well as of the Lord Chancellor's visitors.[2]

Visitors of chancery lunatics.—The visitors whom the Lord Chancellor appoints must be made acquainted with the income and treatment of each of the chancery patients, who must be visited at least once a year for the purpose of seeing that proper attentions are paid to them. The visitors must not be interested directly or indirectly in any asylum or house, in which the patient may be placed. The residence of any alleged lunatic in England always gives jurisdiction to the Court of Chancery over him, though his property may be situated elsewhere; and the court will appoint a committee of the estate as well as of the person. And since the benefit of the lunatic is everything, it has been allowed that he should even reside abroad, if exceptional circumstances render this course expedient. If any person disputes the verdict in any inquisition of lunacy, or if the lunatic has recovered, the proper way is to apply by petition for a writ of *supersedeas*, which will be allowed or suspended in order that the facts may be traversed, and in effect a new trial is held, involving the same issue of lunacy or no lunacy. As the finding of the fact of lunacy by inquisition is conclusive for the time being, no further evidence is required than the inquisition, in order to justify the reception of the patient into any

[1] 25 & 26 Vic. c. 86, § 12. [2] Ibid. c. 111, § 22.

hospital or licensed house, with further order, or medical certificate.

Protection against imprisonment as a lunatic.—It thus appears, that the law requires all persons to give notice when they find a lunatic uncared for: and that the steps by which a person is imprisoned in an asylum, hospital, or licensed house, are jealously guarded, by requiring that those who put the law in motion should have good grounds, and should act without malice, and that the keepers of houses (except where a single patient is kept, not for profit), when such a house is not an asylum or hospital, should have a licence; and in all cases that certain legal documents accompany the patient, before they lend themselves to depriving a fellow creature of liberty. And if any error is made, an action and heavy damages await the person who has committed it. If a medical man sign a certificate or contravene the provisions of the statute, he incurs a penalty of twenty pounds, and if he falsely state anything in the certificate, he is guilty of a misdemeanour.[1] In short, unless a medical man and a keeper of a licensed or unlicensed house, who interferes with a lunatic, is well acquainted with the law and its minute requirements, he runs great risk of involving himself in litigation or in criminal proceedings.

Responsibility of lunatics for crime.—The responsibility of a lunatic for crime can only be conclusively determined by a jury, when, on his being tried, as if he were sane, and setting up the insanity, they are to find whether at the time he knew that the act he did was wrong.[2] If the jury find that he did not know the act was wrong, and that he was a lunatic, and is acquitted on that ground, the prisoner is kept in gaol during her Majesty's pleasure, in other words, is put into a suitable asylum.[3] And under this statute, if a deaf and dumb prisoner does not understand the procedure of the trial, he also may be disposed of in this way.[4] And if a prisoner for crime, or for any debt or other process, appear to be insane, two justices may inquire into his sanity, and send him to the county lunatic

[1] 16 & 17 Vic. c. 97, § 122; c. 96, § 13. [2] Macnaghten's Case, 10 Cl. & F. 200. [3] 39 & 40 Geo. III. c. 94; 3 & 4 Vic. c. 54, § 3. [4] R. v Berry, 45 L. J., M. C. 123.

asylum, and determine his settlement so as to know what union is bound to maintain him.[1]

Protection of weakminded people, not lunatics.—All persons are either lunatics or sane, and there is no intermediate class too mad to be sane, and not mad enough to be insane. The consequence is, that unless in one or other of the ways already described one is declared to be insane, he cannot be subjected to any restrictions, either as to the care of his property or the custody of his person, but must manage it, as well as himself, the best way he can. There are many stages and degrees of weakmindedness, as to which persons are said to be in this intermediate state, but unless the jury or a master can go the whole length and find lunacy, the original state of things remains. However senseless and weak be the conduct of the person, he must be bound by it as in ordinary cases; and though in proceedings to set aside deeds or documents on the ground of fraud or duress, this weakness of mind may be an element for consideration, yet in the eye of the law he remains all the time *sui juris*, and is capable of managing his own affairs. It was otherwise in the Roman law, for so early as the Twelve Tables it made provision for appointing curators to spendthrifts and weakminded persons. And some modern laws have more or less followed up this view.

The punishment of drunkards.—The last topic of inquiry in this chapter is that temporary state of delirium called drunkenness, which is nothing else than lunacy during the time it lasts, and requires some special provision of the law in order to meet the crisis it creates. During this brief frenzy the drunkard often commits serious crimes, and afterwards sets up the defence, that he was unconscious all the while of what he was doing. He is a cause of danger to all who come in his way. It is true, that he is his own worst enemy, but is not the less also the enemy of his neighbours. And hence, over and above any incapacity as

[1] 3 & 4 Vic. c. 54. The old Welsh laws made idiots responsible for murder on the crude doctrine that their kindred ought to have prevented the wrong.—*Anc. Welsh. L.* b. iv. p. 389. When persons became lunatic after the accusation of treason, though sane at the time of the crime being committed, they were to be tried by commission, and if found guilty were to suffer death.—33 Hen. VIII. c. 20.

to contract, or as to crime or other mitigation or modification of liability which he may be able to establish, as regards his acts, there is something due to the public for the trouble caused. Some preventive means are sought for by all in order to avoid such risk. Some punishment for the act of drunkenness in itself is also called for, not only as a deterrent, but as a slight reparation for mischief actually done and more apprehended. And in fixing on the right punishment laws have varied much.

Ancient punishments of drunkenness.—Amid the great variety of treatment to which drunkenness was subjected by the ancients, all lawgivers seem to agree in treating drunkenness as a state of disgrace; and since it is brought on deliberately, it is still more odious, and without excuse. Whatever individuals may think and say, no nation treats it as meritorious. Yet Darius is said to have ordered it to be stated in his epitaph, that he could drink a great deal of wine, and bear it well[1]—a virtue which Demosthenes observed, was only the virtue of a sponge.[2] At the Greek festival of Dionysia, it was a crime not to be drunk, this being a symptom of ingratitude to the god of wine, and prizes were awarded to those who became drunk most quickly.[3] And the Roman bacchantes, decked with garlands of ivy, and amid deafening drums and cymbals, were equally applauded; but at length, even the Bacchanalia were suppressed by a decree of the senate, about 186 B.C.

Notwithstanding these exceptions, the offence of drunkenness was a source of great perplexity to the ancients, who tried nearly every possible way of dealing with it. If none succeeded, probably it was because they did not begin early enough, by intercepting some of the ways and means by which the insidious vice is incited and propagated.

Severe treatment was often tried to little effect. The Mosaic law seems to have imposed stoning to death as a fit punishment, at least if the drunkenness was coupled with any disobedience of parents.[4] The Locrians, under Zaleucus, made it a capital offence to drink wine, if it was not mixed with water;[5] even an invalid was not exempted from punishment, unless by order of a physician.[6] Pittacus,

[1] Athen. b. x. c. 9. [2] Plut. Demosth. [3] Lucian, De Cal. 16; Aristoph. Ach. 943. [4] Deut. xxi. 18. [5] Athen. b. x. c. 7. [6] Ælian, ii. 37.

of Mitylene, made a law that he who, when drunk, committed an offence, should suffer double the punishment which he would do, if sober; and Plato, Aristotle, and Plutarch, applauded this as the height of wisdom.[1] The Roman censors could expel a senator for being drunk, and take away his horse.[2] Mahomet ordered drunkards to be bastinadoed with eighty blows.[3]

Other nations thought of limiting the quantity to be drunk at one time, or at one sitting. The Egyptians put some limit, though what it was, is not stated.[4] The Spartans also had some limit.[5] The Arabians fixed the quantity at twelve glasses a man; but the size of glass was unfortunately not clearly defined by the historians.[6] The Anglo-Saxons went no further than to order silver nails to be fixed on the side of drinking cups, so that each might know his proper measure.[7] And it is said that this was done by King Edgar after noticing the drunken habits of the Danes.[8] Lycurgus, of Thrace, went to the root of the matter, by ordering the vines to be cut down.[9] And his conduct was imitated in 704 by Terbulus, of Bulgaria.[10] The Suevi prohibited wine to be imported.[11] And the Spartans tried to turn the vice into contempt by systematically making their slaves drunk once a year, to show their children how foolish and contemptible men looked in that state.

Drunkenness was deemed much more vicious in some classes of persons than in others. The ancient Indians held it lawful to kill a king, when he was drunk.[12] The Athenians made it a capital offence for a magistrate to be drunk,[13] and Charlemagne imitated this by a law, that judges on the bench and pleaders should do their business fasting.[14] The Carthaginians prohibited magistrates, governors, soldiers, and servants from any drinking.[15] The Scots, in the second century, made it a capital offence for magistrates to be

[1] Diog. Laert. b. i. c. 76; Arist. Eth. c. 6; Pol. b. iii. c. 10; Plut. Socr. [2] Alex. ab Alex. b. iii. c. 11. [3] Seld. Ux. Heb. b. iii. c. 15. [4] Diod. Sic. b. i. [5] Plato, Leg. b. i.; Xenoph. De Rep. Lac. c. 5, § 4; Plut. Lacon. [6] Strabo, b. xvi. fol. 141. [7] Seld. Anal. b. ii. 6. [8] 3 Inst. 200. [9] Plut. De Aud. Poetis. 15. [10] Bonfinius de Reb. Ung. b. i. [11] Cæsar, b. iv. [12] Alex. ab Alex. b. iii. c. 11. [13] Diog. Laert. Solon, b. i. § 57. [14] Pelloutier, Hist. Celt. [15] Plato, Leg. b. ii.; Alex. ab. Alex.

drunk; and Constantine II. of Scotland, in 861, extended a like punishment to young people.[1]

Again, some laws have absolutely prohibited wine from being drunk by women. The Massilians so decreed.[2] The Romans did the same, and extended the prohibition to young men under thirty or thirty five.[3] And the husband and wife's relations could scourge the wife for offending, and the husband himself might scourge her to death.[4]

Modern legislation in England as to drunkards.—In England, in the time of Edward I. and much later, the haunting of taverns was a common offence, and seems to have been punished with the stocks. In the time of Edward VI. the surveillance of alehouses was committed to justices of the peace, and has ever since so continued.[5] In 1603, an alehouse-keeper who allowed others than travellers, or sojourners, to continue drinking and tippling in his inn, was fined ten shillings.[6] But, in 1606, another statute recited, "That the loathsome and odious sin of drunkenness had grown into common use, and was the root and foundation of many other enormous sins, as bloodshed, stabbing, murder, swearing, fornication, adultery, and such like, to the great dishonour of God, and abusively wasting the good creatures of God." The statute then inflicted a penalty of five shillings on every person who shall be drunk, and be lawfully convicted; and failing payment, or distress of goods, he was to be committed to the stocks for six hours. And on a second offence he was, in addition, to find two sureties for good behaviour.[7] And any justice of the peace might, either on his own view, or proof of one witness, convict the offender.[8] This was the statute which existed in England for the punishment of drunkards for two centuries and a half.

Many statutes have since passed, and been altered, repealed, or amended, and all have ended in the sole enactment now in force, which was passed in 1872. By this law every person found drunk in any highway, or other public place, whether a building or not, or in any licensed premises, shall be liable to a penalty of ten shillings, and

[1] Hect. Boet. b. v. fol. 79, 105. [2] Athen. b. x. c. 7. [3] Ælian. b. ii. c. 38; Athen. b. x. c. 7. [4] Dion. Hal. b. ii. c. 24. [5] 5 & 6 Ed. VI. c. 25. [6] 1 Jas. I. c. 9 [7] 4 Jas. I. c. 5. [8] 21 Jas. I. c. 7.

for a second offence, within twelve months, to a penalty of twenty shillings, and for a third offence within twelve months, to a penalty of forty shillings. Moreover, whenever any one, in a highway or other public place, whether a building or not, is guilty, while drunk, of riotous or disorderly behaviour, or who is drunk while in charge, on any highway, or other public place, of any carriage, horse, cattle or steam engine, or while in possession of loaded fire-arms, he may be apprehended, and may be either fined forty shillings, or imprisoned for one month, and kept to hard labour.[1] It is also an offence punishable with a fine of ten pounds for a licensed person to permit drunkenness in his premises, or to sell any intoxicating liquor to a drunken person.[2] And drunken persons may be refused admittance into, or be turned out of, licensed premises.[3]

Thus no punishment is assigned to mere drunkenness, unless it is exhibited in a highway or public place, or on licensed premises. And it is only when a person is drunk and acting riotously or driving, that he can be apprehended in such public places. For mere drunkenness in a public place, or in licensed premises, he cannot be imprisoned if he pays the fine assigned; though he may be imprisoned without a fine, if he is found drunk and riotous, or disorderly, or drunk while driving a vehicle or cattle. And this law extends to all parts of the kingdom, though under local improvement acts, harbour acts, and other special legislation as to railways, ships, docks, and employments, stronger powers of interference are also sometimes given for arresting and punishing those found drunk within defined localities.

1 35 & 36 Vic. c. 94. § 12. 2 Ibid. § 13. 3 Ibid. § 18.

CHAPTER XII.

VARIATIONS IN RIGHTS AND DUTIES RELATING TO THE BODY CAUSED BY DEATH.

Variations in rights caused by death.—We have now traced all the ways in which the law protects and punishes the body up to the last stage, at which, as Coke said, it becomes "only a lump of earth and hath no capacity." [1] We have seen how the law guards the body from the first beginnings of life, protecting it against even the threat of evil, next against actual wrongs and injuries caused by the negligence, the wilful and malicious acts of others, and also against the fear and reality of want and violence; and we have seen, on the other hand, the worst that can be done to the body through various compulsory acts and duties, the imprisonments before and after trial, the pains and capital punishment which succeed the sentence. And we have seen all these rights, duties, and punishments modified during infancy, and by the difference of sex, and by the want of mental capacity. We have thus nothing more left than to consider the final collapse of all this edifice of securities, when age, sex, sanity—all the rights and wrongs concentrated in the person—suddenly disappear, the animating spirit ceases to govern the complicated web, and new hands take up the unfinished threads. So far as relates to the property, the pending contracts and undertakings, these belong to other divisions of the law; but we must here trace the last duties relating to the body, and before we close this division of the law we must see that body buried in peace. When that stage is reached, the law parts company with the individual, and has done all that it can do for him.

[1] 12 Coke, 114.

Respect paid to the dead body.—Writers on the law of nature have observed, that nearly every nation and tribe agree in treating the death of a human being as a signal for some marks of respect on the part of the survivors; and though there are great varieties in the outward forms which this sentiment assumes, yet it is a sentiment all but universal. A great fact is confronted, which levels all grades of intelligence and overmasters the strongest as well as the weakest. The law does not, and cannot, and ought not to control the feelings of humanity, yet it is singular that the ancients felt it necessary to bring the law to bear even on some of these points, which we have for some centuries left unnoticed, probably for no other reason than because we find it best to let such matters alone. Both the expense and the grief attending funerals have been largely restrained in many countries, and one of these is still in some degree also kept in check by our own law. Sir James Mackintosh said, that the desire to honour the dead was one of the safeguards of morality.[1] Most savages indeed think, that, if it were not for the malignity of sorcerers, men would live for ever.[2] And in their bewilderment at a funeral, they often fix upon a supposed sorcerer and despatch him with swift and malignant fury, as the cause of their loss and as baffling all their plans.[3] And probably this despair is one origin of the many forms of displaying grief at the death of a human being. The ancient Egyptians besmeared their hands and faces with dirt, and beat their naked breasts.[4] And the Lacedæmonian women did much the same.[5] Solon was said to have done wisely in prohibiting hired women from wailing at funerals.[6] Homer mentions the dirges sung by Trojan women over the dead body of Hector, and that the end of it was a feast.[7] It was noticed that even Nero's tomb was decked for a time with spring and summer flowers by hands unseen.[8] In ancient Ireland the dirges at the burial were sung by professional mourning women, the race of whom is said not yet to be quite extinct. The wailing included a recital of the virtues and genealogy, and the tearing of the

[1] 9 Parl. Deb. (2nd) 416. [2] 2 Grey's Austr. 238. [3] Taylor's New Zeal. 51. [4] Herod. b. ii. [5] Ibid. b. v. [6] Plut. Sol. [7] Iliad, b. xxiv. [8] Suet. Nero.

hair was a frequent accompaniment.[1] A similar wailing at a Scotch funeral was called the coronach.[2]

Restrictions on self-mutilation and sacrifices at funerals.—Not only have nearly all tribes and nations bewailed the dead, but in the height of grief the relatives have killed themselves as well as others. The Mosaic law prohibited the practice of slashing the flesh as a token of mourning for the dead, though allusions are made which implied, that the garments might be rent.[3] Herodotus related, that when one of a tribe of Thracians died, his wives contended among themselves for the distinction of being most dear

[1] 1 O'Curr. 326.

[2] 18 St. Tr. 714. Among the ancient Egyptians a singular custom prevailed of passing sentence upon the character of the deceased, the body being formally brought before a college of judges, and accusations entertained and scrutinised, and if found sustained, the rites of sepulture were withheld, in which case the bodies were kept by the relatives until the means of refuting the accusations were discovered, and sepulture claimed. And a false accusation in such cases was severely punished.—*Diod.* 1, 92. Indeed the Egyptians allowed the dead body to be denied sepulture until the debts were paid; and a man was allowed to pledge the mummies of his forefathers for debt, but was himself deprived of sepulture, if he omitted to redeem them before his death.—1 *Kenrick's Egypt*, 500; 2 *Kenrick's Egypt*, 59; *Herod.* 2, 136. The Manganga women wailed two days and wore signs of mourning.—*Livingst. Zamb.* 121. The Alaska women wailed a week and suspended all work.—*Dall's Alaska*, 146. The Californian Indians howled for three days to drive away the demon.—3 *Schoolcr.* 140. The Mexican Indians did the same.—4 *Schoolcr.* 75. The Kaffir women lament loudly, while the men sit in profound silence.—*Maclean's Kaffirs*, 102. The southern Indians of America howled for some months every night over the sepulchre, and carried the bones of the dead with them.—*Jones, S. Ind. Antiq.* 111. The New Zealanders also wail.—*Taylor's New Zeal.* 55. In Australia they tear the hair and skin.—2 *Grey's Austr.* 334. The Comanche Indians of Texas mourn for the dead with great noise and vehemence for a week; the female relatives tearing their hair and scarifying their arms and legs with sharp flints, till the blood trickles from all their pores. And some of the mourners even commit suicide in the frenzy of their lamentations. Among other tribes on the Rocky Mountains the men cast off all their finery and bedaub themselves with white clay for some months.—1 *Schoolcraft, Ind. Tribes*, 237, 261. Other tribes have an assembly round the grave, when one addresses the departed soul as if still before them.—2 *Schoolcraft*, 68. In Congo they fasted three days, and then rubbed themselves with oil and dust.—6 *Univ. Mod. Hist.* 469.

[3] Lev. xix. 28; Deut. xiv. 1; 1 Kings, xviii. 28; Jer. xlviii. 37.

to him, and she who was adjudged the favourite was killed on his grave, to the great mortification and disgrace of the others.[1] The ancient Scandinavians had a similar law, and when Balder, one of Odin's companions, died, his wife and domestics were consumed on the pile along with his body.[2] Among the Gentoos it was deemed a religious duty on the part of the widow to burn herself with the corpse of the husband, though the punishment pointed out was in a future world only.[3] In Hindostan the suttee, or practice of the widow burning herself on the funeral pile of a chief, was as good as law, and greatly admired by the people. A crowd collected, and the widow, often in the pride of youthful beauty, stripped herself of her robes and ornaments, which she distributed as gifts to by-standers, and ascended the pile like a martyr; and if her courage failed at the supreme moment, and she uttered a shriek of mercy, the crowd, with remorseless bigotry, would thrust her back into the flames. This practice was thought to have been prescribed by some of their ancient scriptures, though scholars have discovered that there was no such scriptural warrant, and that the practice had been an innovation, though an innovation of 2,000 years' standing. It was with difficulty the practice was put an end to by the British government.[4] And it is said that sometimes 300 or 400 women would burn themselves on the tomb of an Indian king.[5] The Spaniards, in the time of Columbus, found the same practices in Hispaniola.[6] And the practice of suttee prevailed with the Wendish or Sclavonian tribes, who were neighbours of our Saxon ancestors.[7]

[1] Herod. b. v. [2] 1 Mallett, North. Antiq. 342. [3] Gent. Code c. 21. [4] Wilson, Roy. As. Soc. 1854; 1 Elph. Hist. Ind. 361; Bushby, Wid. Burning.; 9 Parl. Deb. (2nd) 703. [5] 1 Harris. Voy. 282. [6] 14 Univ. Mod. Hist. 145.

[7] Innes, Scot. Mid. Ag. 13. The Snake Indians of California kill the wife and horse of the dead man, and often destroy his property also.—1 *Bancroft, Nat. Rac.* 440. And the ancient Scythians killed the concubines and servants, and horses at the tomb of their kings. —*Herod.* b. iv. In Fiji the wife was strangled at the husband's funeral.—*Riccis, Fiji*, 34. Among some Indians of the Rocky Mountains, the women cut off a joint of the finger on the death of a relative.—1 *Bancroft's Nat. Rac.* 127. The Dacotahs run a knife through a fleshy part of the arm.—3 *Schoolcr.* 243. The Comanche Indians cut themselves.—5 *Ibid.* 658. The Fijians cut off a finger. —*Riccis, Fiji*, 34. Some kill slaves to attend their master in the

Restrictions on the expense of funerals.—The only species of restriction now left in our law relates to the expense of funerals, which has apparently been a serious difficulty in the world. Montesquieu said, that it was proper at least for religion to discourage expensive funerals, for a distinction ought not be kept up over an event which levels all distinctions.[1] Solon limited strictly the quantity of meat and drink admissible for a funeral banquet—the tendency in this respect to ruinous excess both in Greece and Rome requiring a positive law on the subject.[2] And these laws were issued in the Twelve Tables at Rome. Solon also prohibited any monument to be erected, which could not be completed by ten men in three days.[3] Plato agreed with Solon in the necessity of restricting the expenditure, according to the rank of the deceased.[4] In the second century the Antonines found it necessary to pass severe laws to restrain the extravagance in funerals and building of sepulchres.[5] But the Christian graves were thought to be less ostentatiously ornamented, as they aimed rather at building themselves monuments in their lifetime, by liberality to the poor, than to leave behind them costly memorials for thieves and robbers to plunder.[6]

Limit by English law to expense of funerals.—There is in our law no limit put on the expense of funerals, except where the deceased's estate, out of which the expense may be paid, is limited by the claims of creditors or legatees, or

other world, as the Thlinkeets of the Pacific, and the Kadiaks.—1 *Bancroft, Nat. R.* 86, 108. The New Zealand and Polynesian savages. —*Taylor's New Zeal.* 44. In Hondo in Africa.—7 *Univ. Mod. Hist.* 30. In Mexico.—*Prescott's Mex.* The old Scandinavian warriors also thought it becoming to enter the halls of Odin with a retinue of slaves, friends, and horses.—1 *Mallet, North. Antiq.* 342. The Todas substituted buffaloes for horses.—*Marshall, Todas*, 9. At the death of Patroclus, Achilles killed and burnt twelve young captive Trojans, as well as horses, oxen, and sheep and goats.—*Iliad*, b. xxiii. But in Japan, though at first it was deemed the duty of the servants to commit suicide on the occasion of their master's funeral, a practice was tolerated of dressing up lay figures to perform that function, till the whole formality was discontinued in the sixteenth century. —*Dickson's Japan*, 262.

[1] Montesq. b. xxv. c. 7. [2] Plutarch, Solon. [3] Cic. De Leg. ii. 26. [4] Plato, De Leg. b. xii. [5] Capitol. Vit. M. Anton. [6] Nyssen. Vit. Ephr. tit. 3; Basil. Hom. in Divit. t. 1.

next of kin; and as these competing claims are always in existence, something like a rule, though it is little else than a caution, has been laid down by the courts. An executor is invested with the legal duty of burying the deceased in a manner suitable to the estate left behind him. Lord Holt said, in 1695, that ten pounds was enough to allow to the executor for any one who died in debt.[1] But Lord Hardwicke was more considerate, and when a certain insolvent person left great sums in visionary legacies, and so misled the executor, and also directed his body to be buried thirty miles off, a sum of sixty pounds was allowed, so as to prevent hardship to those who trusted so readily to appearances.[2] But no fixed rule can be laid down, except that an executor must act with some regard to the station in life of the deceased; and if he err in the estimate, he must take the risk of some court afterwards disallowing part of the outlay.[3] There are also some incidents which, if questions of account be raised and criticised, are seldom allowable, as, for example, mourning rings distributed to friends, or mourning to the widow.[4]

What is done with the dead body.—The world has seen great varieties in the way of disposing of the dead body, and the light of nature can scarcely be traced distinctly; for if savage tribes have any claim to share in this innate law, their settled customs, which are their laws, do not evince much consistency. But in modern times considerable uniformity of practice has been attained among more advanced communities. The laws of Zoroaster prohibited the ancient Persians, under pain of death, from burying a dead body in the earth, because it polluted the soil; or from burning it, because it polluted the air; or from throwing it into the water for a like reason; but a high walled cemetery, far from a public road, was provided, where the bodies were left for dogs and birds of prey to devour.[5] The Persian Magi deemed it improper to bury a dead body till it had been torn by some bird or dog.[6] And the Romans thought there was something defiling in the

[1] Anon. Comb. 342. [2] Stag v Punter, 3 Atk. 119. [3] Edwards v Edwards, 2 Cr. & M. 612. [4] Paice v Canterbury, 14 Ves. 364; Johnson v Baker, 2 C. & P. 207. [5] Zend Avesta, t. i. part 2. [6] Diog. Laert. b. i. c. 6.

sight of one, and prohibited the pontifex maximus, augurs and priests from attending funerals.[1]

The custom of burning the dead was almost universal among rude nations from the time of Homer to King Alfred.[2] Cæsar mentions it as the custom of the Gauls.[3] And Pliny says, Sylla was the first Roman whose body was burned.[4] The ancient Prussians burned their dead, until they promised the Pope's legate to bury the bodies thereafter.[5] Many Pacific races still burn the dead.[6] Some tribes hang the dead bodies up in trees or on scaffolds to dry and rot away.[7] Others expose the dead to dogs and vultures or crocodiles.[8] Others put the body in a box a few feet above ground, to prevent the ravages of beasts.[9] Many also bury the body in a sitting or upright posture.[10] The ancient Scandinavians buried the body under great mounds.[11] The ancient Egyptians embalmed the body, and used to pawn it to raise money.[12] Some tribes put food in the grave, or flints and a match to strike a light, or dress the body in its best clothes, and fill the pockets with food.[13] And the Greeks and Romans put a piece of silver in the dead man's mouth. The Jews, as far back as history goes, had the practice of burying their dead.[14] And Tacitus speaks of them as differing from other nations in preferring burial in the earth to burning.[15]

Digging up or altering position of dead body.—The Salique and Bavarian laws imposed a heavy fine for indignity to a dead body, such as taking it out of the earth or despoiling it of its shroud.[16] Montesquieu mentions a law of the Franks, that a person who had dug up a corpse out of the ground in order to strip it, should be banished from society,

[1] Plut. Syll. [2] Ingram's Lect. p. 83. [3] Cæs. De Bell. Gall. b. vi. c. 19. [4] Plut. Numa. [5] Forst. North. Voy. p. 72. [6] 1 Bancroft, Nat. Races, 113, 172; 3 Schoolcraft, 108. [7] Taylor's New Zeal. 47, 220; Jones, S. Ind. 105; 1 Schooler. 262; Falkner's Patag. [8] Thomson's Malacca, 38; Livingst. Zamb. 221; Dall's Alaska, 383; 1 Bancroft, Nat. R. 119, 427. [9] Parry's Voy. [10] Mouatt, 327; Belcher, 43; 1 Williams, 192; 1 Schooler. 305; 3 Ibid. 193. [11] Mallet, North. Ant. 212; Worsaae's Danes, 43. [12] Herod. b. ii. b. iii. [13] Dall's Alaska, 146, 390; Marshall's Todas; 1 Bancroft, Nat. R. 66; 3 Schooler. 60; 1 Mallet, North. Ant. 345. [14] Gen. xxiii. 8. [15] Tac. Hist. b. v. c. 5. [16] Sal. tit. 17; Alam. tit. 50.

and no one suffered to relieve his wants, till the relations of the deceased consented to his re-admission.[1]

In our own law the same view is held. A dead body is not an article of property; but to disturb it is deemed a misdemeanour, or to take it up even for the purpose of dissection. The court gave as the only reason of this, that common decency required, that the body should not be disturbed.[2] Much more is it a misdemeanour, if the object is to sell the body.[3] And it is equally so, even if the object is laudable, as for a son to disinter a parent's body in order to find a more suitable resting place.[4] But though it is only a misdemeanour to take away a dead body, yet if there is a shroud or coffin or other chattel taken along with the body, as the property in such chattels remains in the executors, the offence of larceny will be deemed to be committed as against them. And Coke called this an inhuman and barbarous felony.[5]

Robbing churchyards and stealing dead bodies.—The cupidity of man seems in all ages to have prompted him to rob not only the living, but the dead, by rifling the graves and despoiling them of the ornaments, which the piety and charity of friends have placed in honour of the dead. By the old Roman law it was a capital crime to injure or dig up a dead body laid in its grave, which punishment was sometimes commuted into banishment.[6] And the Christian emperors continued the law.[7] To desecrate sepulchres and appropriate the materials was also a ground of confiscation of the house or farm on which the materials were used; and afterwards a fine was added, and other punishments.[8] A robber of graves was the most infamous of all robbers, and the Church treated him as liable to public penance. Coke observed, that the stealing of a shroud was larceny, because it was the property of the executors; but as to the dead body itself, larceny could not be committed.[9] In England, the stealing of dead bodies during the present century to supply subjects for medical discovery had become frequent; and a bill was brought into parliament to

[1] Montesq. b. xxx. ch. 19. [2] R. v Lynn, 2 T. R. 733; 1 Leach, 497. [3] R. v Cundick, D. & R., N. P. C. 13. [4] R. v Sharpe, D. & B. 160. [5] R. v Haynes, 12 Rep. 113. [6] Digest. lib. xlvii. tit. 12, leg. 11. [7] Cod. Theod. lib. ix. tit. 17, leg. 2. [8] Valent. Novel. 5. [9] 3 Inst. 110.

allow the dead bodies of those convicted of burglary or highway robbery to be dissected; but the bill was rejected.[1] During the Anatomy Bill discussions about 1830, it was said, that men got four pounds for an adult body, and sold children's bodies at so much per inch.[2] And sometimes ten pounds were paid.[3] At length a statute was passed to enable the dead bodies of convicts, paupers, and others to be obtained without any violation of decorum.

Power of dissecting a dead body, and under what limitations.—The legislature was satisfied, that it was useful in the interest of science, that dead bodies should be dissected; and to prevent the unseemly practices that once prevailed, in order to supply such want, the Home Secretary is empowered to grant a licence, countersigned by two justices of the peace, to authorise any qualified practitioner or college of physicians, or surgeons, or professor in the United Kingdom, to carry on the business of anatomy, and receive bodies for dissection. And inspectors of anatomy are appointed to see that due regulations are enforced.[4] But care was taken of the natural dislike often exhibited against this treatment of the dead. And in all cases, where a person has during lifetime expressed a desire in writing, or has during the last illness verbally expressed such desire in presence of two or more witnesses, that his or her body after death should not undergo examination, or if the wife or husband, or any known relative, has expressed such wish, then the executor or other party in lawful possession of the body shall not permit the body to be dissected; but otherwise he may do so. And when a person has so directed such dissection, then the executor is to see the direction carried out, unless the wife, husband, or nearest known relative forbid it. And in no case is any dissection to take place until forty-eight hours after the death, and after twelve hours' notice to the inspector of the district, or to a physician, and after a certificate of the cause of death has been given.[5]

A pauper's dead body being in the lawful possession of the master of a workhouse, he may allow it to be dissected, subject to exceptions, as in other cases, when this had

[1] 32 Parl. Hist. 919. [2] 20 Parl. Deb. (2nd ser.) 1005. [3] 9 Id. (3rd ser.) 582. [4] 2 & 3 Will. IV. c. 75. [5] Ibid. §§ 7, 8, 9.

been forbidden by the dead person or a near relative.[1] Yet where a master of a workhouse, in order to prevent relatives forbidding the dissection, after showing them the body, secretly changed the coffin, and allowed them to follow an empty coffin to the grave, he was held not liable to an indictment for disposing of the body for gain, though he had cheated the relatives out of the opportunity of expressly forbidding such conduct.[2]

Burying bodies in the earth adopted by early Christians.— Though before the Christian era, with some exceptions, the heathen mode of burial was by burning the body and gathering the ashes in urns, the Christians, mindful of the doctrine of the resurrection, abhorred funeral piles as a species of cruelty, and committed the dead body intact to the earth without disfigurement.[3] Hence their persecutors, in derision of these feelings often purposely exposed the bodies of martyrs to be torn by wild beasts, or burnt and scattered by the four winds.[4] But soon the heathens also abandoned the practice of burning, and it had ceased in 420.[5] It was also comformable to the Christian ideas to embalm the body and preserve it from corruption by myrrh and Sabæan odours.[6] Thus also the Jews prepared the body of Jesus.[7] Another custom in funerals distinguished the early Christians, who, instead of burying the dead by night, as the heathens did, chose to do so in open day, and often with great concourse of spectators, not choosing to lose so impressive a moral lesson to the living. And this so offended Julian the Apostate, that he forbade these spectacles by day, under the pretence that this could not matter to the dead—an edict which was however generally disregarded.[8] At that period men and women, old and young, joined in the procession singing psalms and responses, denoting exultation rather than grief at a brother laid to sleep.[9] The Christian emperors sanctioned burials by day; and even forbade the torch-bearers, who attended, to charge for their services, there being a public fund at Constantinople to defray the cost.[10] The burial of the

[1] 2 & 3 Will. IV. c. 75. [2] R. v Feist, 1 D. & B. 59. [3] Tertull. de Resur. c. 1. [4] Euseb. lib. iv. cap. 15. [5] Macrob. Saturn. lib. vii. cap. 7. [6] Prudent. De Exequiis. [7] John xix. 39. [8] Cod. Theod. lib. ix. tit. 17, leg. 5. [9] Socrat. lib. iii. cap. 18. [10] Justin. Novel. lix. cap. 5.

dead was a religious duty of the highest importance among the living, which the early Christians in their charity would on no account neglect, and to perform which faithfully, they cheerfully encountered persecution and death, as the ancient martyrologies attest.[1] They adopted from the heathens the mode of laying the dead body in a coffin, in preference to the Jewish mode of simply wrapping the body in clothes.[2] But they repudiated the heathen practice of hiring women to make ostentatious lamentations by tearing their hair and beating their breasts at the sound of the pipe, preferring the more solemn chant of psalms and hymns by the company at large;[3] and for the same reason "they renounced the heathen practice of crowning the dead with garlands, preferring the unfading crown of the future."[4] A burial service consisted also of prayers and admonitions.[5] As it was always deemed a privilege and honour to receive a Christian burial, so it was treated as peculiarly the right of those who lived faithful to the duties recognised by the Church. Not only were those who neglected baptism, and who were excommunicated, refused this last tribute of respect, but those who laid violent hands on themselves were deemed to have renounced the privilege, and were denied the solemnity of psalmody.[6]

Legal duty to bury a dead body.—In this country the practice of burial has for many centuries been established, and is accepted as almost a first principle. It is true, that if a parent is too poor to bury his child, he is not liable to any indictment for not doing so; and even, though the parish officer offer to bury the child, on condition of the parent signing an undertaking to repay the expense, the parent is not bound to accept the loan on these terms; nor indeed is it lawful to impose such condition.[7] The legislature has taken care to lay down the general rule, that it is the duty of the overseers or guardians, to bury the body of any poor person found in their parish or union, and charge the expense on the rates.[8] They are authorised out

[1] Euseb. lib. vii. c. 22. [2] Durant. de Ritibus, lib. i. c. 23. [3] Chrys. Hom. 4 in Hebr. [4] Tertull. de Coron. c. 10; Lea's Church Studies. [5] Hieron. Epitaph. Fabiol. cap. 4. [6] Conc. Bracar. i. can. 34; Conc. Aurelian. ii. can. 15. [7] R. v Vann, 2 Den. C. C. 325. [8] 7 & 8 Vic. c. 101, § 31; 18 & 19 Vic. c. 79, § 1.

of the same fund, so far to gratify the desire of the deceased or his relations, as to bury the body in the burial ground of the parish to which he was chargeable, a burden which may in many instances, owing to the distance from their own parish, be extremely heavy, but which the legislature has not thought fit to qualify or limit. The statute expressly prohibits guardians from taking any hire or fee from a school of anatomy in reference to this part of their duty.[1] The earliest definite doctrine on the subject seems to be, that as decency required, that a dead body should be buried by some one, it was *primâ facie* the business of the person, in whose house the death occurred, to perform this act of humanity, and he was indictable for not doing it.[2] And where a wife dies, the husband is deemed to have impliedly authorised any one, who may have buried her, to incur that expense; and so he is bound to reimburse the expense, which is one of the rare instances, in which a contract will be implied out of the circumstances, in which the individual is placed.[3] And carrying out the view of the common law, that such a duty devolves on the occupier of the house for the time being, the guardians of a workhouse, as part of their duty, bury all those who die in their care in the burial place of their parish or union.[4] Moreover, in order to facilitate the claiming, as well as the healthy keeping, of corpses, each sanitary authority has now the power to provide out of their common funds a mortuary.[5]

Obstructing burial of dead body.—It is also an indictable offence to prevent a dead body being buried;[6] or to prevent or to arrest any clergyman or minister reading the burial service over a corpse.[7] And if a gaoler were to detain a dead body, and refuse burial till his fees were paid, the Queen's Bench Division would compel him by mandamus

[1] 7 & 8 Vic. c. 101, § 31; 18 & 19 Vic. c. 79, § 1. Among the ancient Greeks, Solon made it a duty of the relatives to bury the dead.—*Æschin. Tim.* But a spendthrift who had squandered his patrimony was not allowed burial in his native place.—*Diog. Laert. Democr.* A Roman master was bound to bury a slave; and if he buried the slave of another, he could recover the expense as money paid on an implied contract of the slave's master.

[2] R. *v* Stewart, 12 A. & E. 773. [3] Ambrose *v* Kerrison, 10 C. B. 776; Bradshaw *v* Beard, 12 C. B., N. S. 344. [4] R. *v* Stewart, 12 A. & E. 773. [5] 38 & 39 Vic. c. 55, § 141. [6] R. *v* Young, 2 T. R. 734. [7] 24 & 25 Vic. c. 100, § 36.

to deliver up the body, for it is not a subject matter of property in any sense.[1] And he commits an indictable offence in so acting.[2] Indeed, it is altogether illegal to extort money or to insist on conditions, before this debt of honour has been paid to the dead.[3]

Burying dead body cast on shore.—Where, owing to shipwreck or other cause, dead bodies are cast upon shore from the sea, whether they are known or unknown, the churchwardens and overseers of the parish in which the body is found, or the constables or headboroughs in any extra-parochial place, are authorised and bound, at the expense of the poor rates, to have such bodies buried in their churchyards with all convenient speed, and the officers of the parish are also bound to perform their respective duties for their accustomed fees. And to further insure this decent respect to the dead, the person giving notice of such body being found is entitled to a fee of five shillings; and, on the other hand, those neglecting to give similar notice to the overseers or constable within six hours are subject to a fine of five pounds.[4] The overseer or churchwarden or constable neglecting to do his duty under this enactment, also incurs a penalty.[5] And on such occasions the minister is obviously to assume, that the persons were baptized, and to raise no scruple on that ground as to reading the burial service.

Practice of consecrating burial places.—Cicero said sepulture was so sacred a thing, that all were agreed it should be in consecrated ground.[6] The Christian practice of consecrating places of burial seems not to have existed before the year 570.[7] Yet in the second century the heathen emperors treated burial places as sacred, and the violators thereof were guilty of sacrilege.[8] And the Justinian code repeated the law of Julian, which ordained the punishment of sacrilege on all who disturbed graves or robbed them of

[1] R. v Fox, 2 Q. B. 246. [2] R. v Scott, 2 Q. B. 248. [3] Jones v Ashburnham, 4 East, 460; Quick v Coppleton, 1 Vent. 161.

[4] 48 Geo. III. c. 75, § 1. Herodotus mentions that among the ancient Egyptians, if a dead body was cast ashore, the inhabitants of the place had to pay the expense of embalming it and placing it among the consecrated monuments.—*Herod.* b. ii.

[5] 48 Geo. III. c. 75 § 7. [6] Cic. De Leg. b. ii. tit. 21. [7] Greg. Turon. de Glor. Confessor. c. 106. [8] Cod. Just. lib. ix. tit. 19, leg. 1.

ornaments.[1] And it was deemed essential in carrying out this idea, that a churchyard should first be dedicated by the bishop. For a long time this ceremony of consecration was participated in by the bishop, clergy, and the parishioners being present, when a prayer was used for the occasion, and certain fees were also an accompaniment. At length this ceremony was declared superfluous; and the same effect is produced by a formal instrument of the bishop, declaring the land consecrated. And all fees to the bishop's officer for this service were abolished.[2]

The parishioners' right of burial in the churchyard.—The practice of burying in churchyards was said to have been introduced into England from Rome by Cuthbert, Archbishop of Canterbury, in 750. And though the practice of burying in churchyards was declared to be contrary to the Statute of Mortmain,[3] it became inveterate notwithstanding. It had become a well-established custom about the time of legal memory, that, as there was a burial place connected with every church and parish, each inhabitant of that parish, or rather his executors, had a right of burial there.[4] And the canon law had a prudent and business-like maxim, that, where the living man paid his tithes, there he should be buried when dead. This maxim seemed to imply, that each parishioner was entitled to be buried in his own parish, though he had died elsewhere.[5] It has been said, that to allow non-parishioners to be buried is entirely matter of grace on the part of the churchwardens and the incumbent, for they cannot legally give away to strangers what is reserved for the exclusive use of the parish.[6] And for a like reason, as the parish churchyard is for the general use, it is not incumbent on the churchwardens, nor will they be compelled to bury a body

[1] Cod. Just. lib. ix. tit. 19, leg. 5.

[2] 30 & 31 Vic. c. 133. This act enables donors to dedicate land as churchyards, and reserve part as a family burying ground.

[3] 15 Rich. II. c. 5; 7 Ed. I. st. 2.

[4] Com. Dig. Cemetery B.

[5] In Benin, Africa, a dead man's body was always brought back to the place of his birth to be buried; and the body was carefully preserved till an opportunity of transit occurred.—6 *Univ. Mod. Hist.* 582. Among the Caribbees a dead man is buried in the middle of his house, and the family forsake it.—5 *Univ. Mod. Hist.* 234.

[6] See Bardin *v* Calcott, 1 Hagg. Cons. 17.

in any particular part of the churchyard[1] unless the right to bury in a particular vault has been enjoyed for a prescriptive period, as annexed to an ancient messuage.[2] A parishioner, however, was deemed to have a right to be buried in the parish churchyard, whether the clergyman of the parish performed the burial service or not; while the clergyman's neglect of duty was punishable in the Ecclesiastical Court.[3]

Duty of parish priest to allow burial.—Wherever a person dies, the parish priest can be compelled to give to the body burial in the parish churchyard, or some cemetery substituted for it. And in default of any specific mode of enforcing this right, the common law, as already stated, views it as a duty attaching to the person in whose house the dead body is found, to carry such body decently covered to the place of burial. He cannot keep the body unburied or cast it out exposed to violation, or in a situation to offend the feelings and endanger the health of the living.[4]

Duty of parish priest to perform burial service.—Not only is a parishioner deemed entitled to be buried in his parish churchyard, but also to have the burial service of the Church of England performed over his body. It is true, there is some qualification to this doctrine. The minister of the parish is not at liberty to refuse to bury any corpse if he has received due notice of the time appointed; and he commits an ecclesiastical offence by refusing.[5] And this has been interpreted to mean, that it is for the relatives and not for the minister to appoint the time of burial.[6] So entirely is it a ministerial duty of the parish priest to bury the dead body of a parishioner in the parish churchyard, that, if he refuse, the Court of Queen's Bench will compel him by mandamus to perform the duty. But it will not compel him to perform the ceremony in any unusual manner, as, for example, compel him to bury the body in an iron coffin.[7] At the same time it is sometimes said to be the law, that no corpse is to be buried without the Church service being at the time performed over it,[8] and

[1] Ex p. Blackmore, 1 B. & Ad. 122. [2] Bryan v Whistler, 8 B. & C. 295. [3] R. v Coleridge, 2 B. & Ald. 206. [4] R. v Stewart, 12 A. & E. 773. [5] Canon 68. [6] Titchmarsh v Chapman, 1 Rob. 175; Andrews v Cauthorne, Willes, 537. [7] R. v Coleridge, 2 B. & Ald. 806. [8] Kemp v Wickes, 3 Phill. 295.

yet that it is illegal for any layman or unauthorised person to read the service in consecrated ground over such body.[1] It is thus the duty of the minister to read the burial service over the dead body, whether the relatives wish it or not. And there is nothing which obliges the clergyman to stand on consecrated ground, while he discharges this duty relating to burial.[2]

The canon law allowed several grounds of excuse for the minister refusing to read the burial service over the corpse, such as that the dead person was a heretic, or had failed to receive the holy communion once in the year; but the canon 68 reduces the grounds of refusal to three, namely, that the dead had died unbaptised, that he had been excommunicated, or had laid violent hands on himself. One ground of refusal, namely, that the dead person had committed some crime, and no man was able to testify of his repentance, had been attempted to be pushed to the length of refusing to bury a person who died in a state of intoxication; but the court held, this was no sufficient ground of excuse.[3] As regards baptism, the law has interpreted this to mean baptism *de facto*, whether by a layman or dissenting clergyman, or a priest. And not only is baptism by dissenting clergymen sufficient in the eye of the law to justify the claim to be buried with the Church burial service, but every minister of the Church of England is bound to baptise every child of a parishioner on pain of committing an ecclesiastical offence, for which he may be suspended for three months.[4] Those who have laid violent hands on themselves are deemed such as have destroyed themselves wilfully, as distinguished from mere incapacity of mind. And moreover, as it is the province of the coroner's jury to find, whether the deceased person died *felo de se* or in a state of lunacy, this verdict ought to be followed implicitly by the minister; and he has no right to act on a different opinion of his own. It is enough for him that the legally constituted tribunal has pronounced a definite opinion on the subject, after hearing all the evidence available, and it would be idle for him to set up his

[1] Johnson *v* Friend, 6 Jur. N. S. 280. [2] Rugg *v* Kingsmill, L. R., 1 Eccl. 343. [3] Cooper *v* Dodd, 2 Rob. 270. [4] Escott *v* Mastin, 4 Moore, P. C. 104; Morse *v* Henslow, 3 Notes of C. 272.

own opinion against the voice of the law.[1] Though it was once held, that a suicide had disentitled himself to Christian burial, and was buried elsewhere, yet in 1824 the law was relaxed, and he was allowed to be buried at night without a ceremony in the usual churchyard.[2]

Right of burial in churches.—It seems to be agreed among the learned, that, as Plato and the Twelve Tables enjoined, there was no burying of the dead within cities; and for the first three centuries of the Christian era the old custom prevailed of burying at the side of highways beyond the city gates, sometimes in catacombs or excavated places.[3] And during all that time there was no burying in churches. It was also the custom of the Jews to bury without the city.[4] But the honour done to martyrs in the fourth century led to a close association between the churches and the dead; and the habit began of erecting churches over the memorials of holy men, and after this close connection whenever a new church was built, it was deemed decorous to bury martyrs within or near it. The rule was by degrees relaxed so as to allow emperors and great men to lie in the porch and churchyard. In the sixth century the dead generally were admitted to be buried in the churchyard. Thus Justinian repealed that part of the Theodosian code which prohibited burials in cities, but still retained the prohibition against ordinary burials in churches.[5] And after various relaxations of the law it became less and less exceptional to allow burials in churches, till it came to be treated as matter of discretion for the bishops and presbyters. By the canons of Edward the Confessor nobody but a priest or holy man of exceptional merits could be buried in a church.[6] In the Council of Winchester, 1076, a law was passed still prohibiting these burials in churches.[7] By the year 1230, however, Boniface VIII. spoke of the custom of men to be buried in the church in the sepulchres of their ancestors.[8]

But the right of parishioners to burial does not extend to the parish churches, and the incumbent is entitled to refuse

[1] Cooper *v* Dodd, 2 Rob. 270; 7 Notes of C. 514. [2] 4 Geo. IV. c. 52. [3] Bing. Chr. Antiq. b. xxii. c. 1. [4] Matth. xxvii. 60; Luke vii. 12; John xi. 30. [5] Just. Code, lib. i. tit. 2, leg. 2. [6] Ken. Par. Antiq. 592. [7] Conc. Winton. an. 1076, can. 9. [8] Sext. Decretal. lib. iii. tit. 12, c. 2.

this privilege, for, by the canon law, he alone is invested with this discretion in each individual case, and neither churchwardens nor the ordinary can interfere with its exercise, as the canon *de non sepeliendo in ecclesiis* confines the privilege to priests and holy men.[1] Nor can the incumbent bind himself or his successor as to future burials there, though a faculty may be obtained to bury in a church vault, or such right may be claimed by prescription.[2] For sanitary reasons however burials in churches built since 1848 are absolutely prohibited; and in other cases may be so by the Secretary of State.[3]

Right to be buried in a coffin.—But though each parishioner is deemed entitled to be buried in the parish churchyard, this right is subject to be controlled by the churchwardens, as regards the place and mode of burial. The parishioner or his representatives cannot insist either upon the body being buried in any particular spot, or in any special mode, as, for example, in a leaden or marble coffin.[4] Among the ancient Egyptians the body was usually embalmed and buried in a sepulchre, but not inclosed in a coffin.[5] Coffins were unknown among the Greeks and Romans, though burial in the earth was not unknown.[6] There is no trace among the Anglo-Saxons of their burning the dead, but wooden coffins were in use as Bede mentions in his *History of the Abbess of Ely.* The places of burial were remote from cities, for Bishop Cuthbert, long after the introduction of Christianity, obtained leave to make cemeteries within cities. And the churchyard was deemed to be defiled by the entrance of a horse or a falcon.[7] The view was suggested, that an iron or leaden coffin, being in its nature imperishable, would occupy space for an indefinite length of time, and to that extent deprive the other parishioners, and future generations, of the space so occupied where space might be valuable. Indeed philosophers have pointed out, that for sanitary reasons, the more quickly the body and its envelopments decay and resolve themselves into the surrounding dust,

[1] Ex p. Blackmore, 1 B. & Ad. 122; Bryan v Whistler, 8 B. & C. 295. [2] Rugg v Kingsmill, L. R., 1 Eccl. 343. [3] 39 & 40 Vic. c. 55; 16 & 17 Vic. c. 134. [4] R. v Coleridge, 2 B. & Ald. 806. [5] 1 Kenrick, Egypt, 501. [6] Cic. de Legib. b. xi. c. 32; Gilbert v Buzzard, 3 Phillim. 348. [7] 1 K. Alfred's Life, 489.

and the sooner the putrefaction becomes neutralised and absorbed, the better for the survivors. Yet Lord Stowell says, that when a European sovereign in his time, impressed by such sentiments, decreed in his Italian dominions that all the dead of all ages, qualities, and distempers should be collected each night in a cart at the sound of a bell, and tumbled naked in one indiscriminate mass into a pit with greater speed, the edict was found so revolting to the habits of veneration cherished for the dead by polished societies, that it had to be revoked.[1] If the corpse were to be inclosed in imperishable chests, it would thus be tantamount to the perpetual dedication and exclusive enjoyment of one part of the soil by each body, whereas the earth is the heritage of no one epoch, but is meant to lodge all the fleeting generations. The process of decay is to be precipitated so as to evacuate the space for the ever-growing succession of claimants. The more quickly they disappear from their temporary tenement, the more freely diffused and equally distributed would be this common right. Even a brick grave was an encroachment on the common freehold interest, and carried the pretentions of the dead, or rather of their relatives, to an extent which violated the just rights of the living. Hence it was necessary to check this tendency of mankind to secure an eternal settlement for the dust of their friends. Controlling power is required in the ecclesiastical magistrate to guard the interests of unborn generations. And though coffins of various materials were occasionally used in Western Europe from early Christian centuries, there had been in England a large number of uncoffined corpses committed to the grave up to the seventeenth century, as noticed by Spelman.[2] All this led Lord Stowell to conclude that the extent of the right claimed by each parishioner was only this, that he might be buried without a coffin, or in a wooden coffin, which would decay quickly, but when it came to be leaden or iron or indestructible substance, this was beyond the right, and could only be claimed as a favour at the hands of the churchwardens. The same judge also concluded, not that metal or indestructible coffins should be excluded altogether from the churchyard, but that they should only be admitted on paying larger burial fees—a conclusion

[1] Gilbert v Buzzard, 3 Phill. 348. [2] Spelman, Tract. de Sepult.

which was not calculated to diminish the evils, though for practical purposes it fairly satisfied the requirements of rich and poor. Hence it is deemed, that the priest may justly frame a table of fees, which the ecclesiastical court may revise, in order to compensate the parish for the encroachment on the rights of the present generation.

At one time it was thought necessary for the good of the woollen trade to prohibit under a penalty any one to be buried in other than a woollen shroud, or in a coffin lined with flax, silk, or hair.[1] But those statutes were repealed in 1814.[2]

Burying more than one body in one coffin.—It is an offence to put more than one body in a coffin, without giving notice to the person, who buries or performs the funeral service, of the fact. The notice given must state the name, sex, and place of abode, or other particulars; and if the additional body is that of a still-born child, the name and abode of the father, or if the child is illegitimate, of the mother. A failure to comply with this enactment is punishable with a penalty of ten pounds.[3]

How far the churchyard is freehold property.—The freehold of the churchyard is for most purposes deemed vested in the minister, whether he be rector or vicar.[4] Yet the natural consequence of this doctrine is not allowed to the ordinary extent, for while the profits of the grass and the trees belong to him, it is laid down by an ancient ordinance, treated as part of the common law, that he is not allowed to cut down the trees or grub the underwood, except for the sole purpose of repairing the church[5] or the parsonage house, and its barns and outhouses.[6] And he cannot do so when his object is to make up for dilapidations which he had negligently incurred.[7] The reason why the trees belong to the rector or vicar was said to be, because the burden of repairing the chancel is upon him; but where there are both a rector and vicar of the same parish, there is no definite rule as to which of these is deemed owner of the trees, though Lyndwood inclined to hold that they belong to the rector, unless in the endow-

1 18 & 19 Ch. II. c. 4; 30 Ch. II. c. 3; 32 Ch. II. c. 1. 2 54 Geo. III. c. 108. 3 37 & 38 Vic. c. 88, § 19. 4 Com. Dig., Cemetery A. 2. 5 35 Ed. I. st. 2. 6 Strachey v Francis, 2 Atk. 217. 7 Sowerby v Fryer, L. R., 8 Eq. 417.

ment of the vicarage they be otherwise assigned.[1] While the theory of the common law is, that every parishioner is intitled to the use of the parish churchyard for the burial of his dead, it is also held that it is the duty of the churchwardens, as representing the ordinary, to see that this right is not interfered with by the minister, who is the freeholder, in the exercise of his ordinary right of pasture. For if his cattle trample, deface, or soil the graves, the duty of the churchwarden is to order their removal and guard the parishioners' interests.[2] In one case where swine and cattle entered through a fence, which was out of repair, and rooted up the gravestones and dirtied the porch, the churchwardens were deemed right in indicting the parson.[3] And while the ecclesiastical courts may entertain a suit by the churchwardens against a stranger for encroaching in the churchyard, yet whenever the question of title is actually raised, as to whether the *locus in quo* is the defendant's freehold and not part of the churchyard, the action should be in the common law courts, otherwise a prohibition will lie.[4] If the minister remove tombstones from the churchyard, the representatives of the deceased may sue him for damage.[5] And for a like reason, the churchwardens may repair or renew fences round the churchyard at the expense of the parish, unless there is a valid custom for the adjoining owner to maintain them, in which case the churchwardens may sue such owner.[6]

The maxim, once a churchyard always a churchyard, is so far well founded, that no court has power to grant authority to convert a churchyard into a highway, however beneficial may be the improvement, and though all the persons interested consent.[7] But part of it may be appropriated by a faculty to the purpose of a vestry room, as this is an ecclesiastical purpose.[8] And the same view has been taken of a school-house.[9] The churchway moreover may or may not be a highway according as the public or only

[1] Lyndw. 267; 2 Roll. Abr. 337. [2] 1 Ventr. 367. [3] R. *v* Reynell, 6 East, 315. [4] Hilliard *v* Jefferson, L. Raym. 212; Quilter *v* Newton, Carth. 150. [5] Wilson *v* McMath, 3 Phill. 90; Com, Dig. Cemetery C. [6] 2 Inst. 489; 2 Roll. Abr. 287. [7] Rector of St. John's, Walbrook, *v* Parish, 2 Rob. Ecc. 558. [8] Campbell *v* Paddington, 2 Rob. Eccl. 558. [9] Russell *v* St. Botolph's, 5 Jur. N. S. 300.

a few individuals use it; but whether it is so or not, an indictment is held to be the proper remedy if any one encroach upon it.[1] It is the duty of the churchwardens to proceed against the minister himself, if he commit any nuisance or injury to the churchyard, for the management of it is vested in them.[2]

How far burial fees demandable by a priest.—At common law there is no right either in the minister or churchwardens to demand a fee for burial, or for reading the burial service. And in this respect the canon law agreed, for the constitution of Langton prohibited ministers from taking any fee. It was an ancient custom, however, for the clergy to claim a gift on the decease of any of their parishioners, called a mortuary, which was intended as a species of amends to the ecclesiastics for personal tithes and other duties, which the deceased had forgotten, or omitted to pay. The mortuary consisted of the second best chattel remaining after the lord had taken out his heriot, and was brought into church along with the body, whence it was sometimes denominated a corse present, which implied a voluntary bequest, but which in the reign of Henry II. had become an established custom. These dues varied in amount, and the statute of Henry VIII. reduced them to a scale according to the movable goods left;[3] but in the case of women, children, wayfarers, and those who had no house, none was to be taken. Owing, however, to the readiness in a court of law to find some defence for any pecuniary claim or demand whatever, if it has long been paid without objection, and as one may easily see that fees would be first expected and then demanded, until it became a general custom in many parishes, the courts have often supported a long usage of this kind. They have held that, whenever there has been an immemorial usage to claim and pay a fee for burials, either to the minister or churchwardens, this, if deemed by the court a reasonable fee, will be upheld as the law of each particular parish where such proof exists. Hence, as it is said, burial fees may be legal by special custom, if the evidence is consistent with such payment having been made without resistance from time

[1] 1 Vent. 208; 3 Bac. Abr. 493; Ayl. Parerg. 438; 2 Raym. 1175.
[2] Marriott v Tarpley, 9 Sim. 279. [3] 21 Hen. VIII. c. 16.

immemorial.[1] And if in such a parish payment is refused, the ecclesiastical court may enforce payment. On the other hand, if such payment is disputed, and the matter has not been adjudicated upon by a competent court, the ecclesiastical court will not be allowed to entertain the question, and a court of common law may be resorted to for a prohibition, seeing that legal rights can only properly be determined by the secular court.[2] As to the qualification of reasonableness in such a fee, it may seem difficult for any court to know on what materials it can solve that question. In one case the minister claimed a fee upon any death within his parish, whether the body was buried or not; but the court held it to be against reason, that a stranger passing through the parish, or sleeping in an inn, should be, so to speak, bound to be buried in the parish, or pay as if he were.[3] Lord Stowell seemed to hold, that such an immemorial custom of exacting burial fees might well begin in modern times, on the theory that, until the occasion arose, as, for example, the occasion of populousness, the payment would be unnecessary; but this view assumes that by the original custom this change of circumstances was contemplated—a dangerous doctrine, and one which courts usually set their faces against.[4]

The poor law statutes have not sought to interfere with the antecedent law as to burial fees, and have simply directed that, in case of pauper burials, the overseers or guardians shall pay, out of the poor rates, these fees, if any such are claimable.[5]

Regulation of tombs in parish churchyard.—Where one has been proved to have encroached on the soil of the churchyard, the only judgment which the ecclesiastical court can pronounce is, that the wrongdoer restore the soil to its former state;[6] and any disturbance of the soil, even for a useful purpose, must be authorised by a faculty.[7] And though, in general, the incumbent may consent to placing a tombstone in the churchyard, yet if the ordinary

[1] 2 Show. 184; Littlewood *v* Williams, 6 Taunt. 281; Spry *v* Guard. of Marylebone, 2 Curt. 11. [2] Spry *v* Gallop, 14 M. & W. 716. [3] Topsall *v* Ferrers, Hob. 175. [4] Per L. Stowell in Gilbert *v* Buzzard, 3 Phill. 348; Spry *v* Guard. of Marylebone, 2 Curt. 11. [5] 7 & 8 Vic. c. 101, § 31; 20 & 21 Vic. c. 81, § 6. [6] Harper *v* Forbes, 5 Jur. N. S. 275. [7] Adlam *v* Colthurst, 36 L. J. Eccl. 14.

differ, the decision of the latter must determine the matter.[1] But the discretion even of the ordinary must be reasonable and conformable to common sense and charity; and if not, it will be reviewed by a Court of Appeal.[2] Where, however, tombs, or other encroachments, are made in the churchyard, it is the incumbent who is the proper party to proceed in the ecclesiastical court for the remedy of removal, as the general control of the place is vested in him.[3] Thus where a tombstone was erected with an inscription, "Pray for the soul of J. W.," and it was complained of as suggesting doctrines contrary to the Church of England, it was held that the incumbent was right in proceeding, though the court held that there was nothing in such inscription calling for disapproval.[4] And it is not safe for any parishioner to erect a tomb, or other work, without the protection of a faculty, for though the incumbent may authorise it, he may also revoke such authority without any reason, or the ordinary may overrule his wishes; yet when a third party has put a tomb in a churchyard, it remains his property, though subject to the control of the ordinary, who may, unless a faculty be obtained, allow strangers to use the tomb for burials.[5] And, according to the common law, when a tomb is once erected, it is a common law offence to deface it.[6]

Protection of graves against injury.—Besides the ordinary protection of the law, through the medium of the churchwardens, the rector and ordinary, in parish churchyards, if graves or tombs are wilfully injured or defaced in a cemetery, the person so acting may be fined five pounds.[7] The burial boards have like control over the graves. And

[1] Breeks *v* Woolfrey, 1 Curt. 880. [2] Keet *v* Smith, L. R., 1 Prob. Div. 73. [3] Breeks *v* Woolfrey, 1 Curt. 880. [4] Ibid. [5] Bryan *v* Whistler, 8 B. & Cr. 288.

[6] 3 Inst. 201. Lycurgus prohibited any inscription to be made on the tomb unless the dead man had been slain in battle, or the dead woman had filled a sacred office.—*Plut. Lycurg.* Plato in his laws wisely enjoined, that the cemeteries should be in places not cultivated, for no man, living or dead, should deprive the living of the sustenance which the earth is calculated to produce; and he directed, that no tombstone should be larger than would be sufficient to record the praises of the dead in four heroic lines.—*Plato, De Leg.* b. xii.

[7] 10 & 11 Vic. c. 65, § 58.

it is a misdemeanour to destroy a tomb in any burial ground or churchyard.[1] It is also an ecclesiastical offence for the churchwardens, or any others, to desecrate the churchyard by removing human remains.[2] The right to a tombstone, vests, as already stated, in the person who erected it.[3]

Enlarging parish churchyard.—Power was conferred by statute on commissioners, to require parishes to purchase lands for increasing the churchyards; or the commissioners might accept gifts of land for such purposes.[4] And when the land was consecrated, it vested in the person in whom the freehold of the ancient churchyard was vested.[5] But by a later statute it vests in the incumbent of the church, to which the burial ground may belong, and may be treated as within the bounds of the parish.[6] And the commissioners under the statute may declare an additional burial ground to be for the common use of two or more parishes, and may alter the fences and entrances with the approval of two justices.[7]

Making new burial grounds.—As modern experience had established the danger to the health of the living, caused by burials in churchyards in populous places, statutes have been passed to discontinue the practice. And the Secretary of State may by order in council prohibit the further use of a parish churchyard in any populous place for purposes of burial, with one or two exceptions.[8] It is also unlawful to open or use any new burial ground, without the approval of the Secretary of State.[9] A great variety of statutes have provided facilities for obtaining and establishing burial grounds in all parts of the country, managed by burial boards and sanitary authorities.[10]

[1] 24 & 25 Vic. c. 97, § 39. [2] Adlam *v* Colthurst, L. R., 2 Adm. & E. 30. [3] Spooner *v* Brewster, 3 Bing. 136; see *ante*. [4] 58 Geo. III. c. 45, § 33; 59 Geo. III. c. 34, § 36. [5] 59 Geo. III. c. 134, § 38. [6] 8 & 9 Vic. c. 70, §§ 13, 14. [7] 9 & 10 Vic. c. 68.

[8] 15 & 16 Vic. c. 85; 16 & 17 Vic. c. 134; 34 & 35 Vic. c. 33. The ancient Chaldæans had their tombs and also cemetery cities devoted to the purpose apparently of burials and nothing else, the remains covering miles in extent, and in depth about fifty feet. These tombs usually had drinking-vessels inclosed with the bodies. —1 *Rawlinson's Five Mon.* 111.

[9] 16 & 17 Vic. c. 134. [10] 15 & 16 Vic. c. 85; 16 & 17 Vic. c. 134; 18 & 19 Vic. c. 128; 20 & 21 Vic. c. 81; 23 & 24 Vic. c. 64; 34 & 35 Vic. c. 33; 38 & 39 Vic. 55.

Registration of deaths.—Burials, like births, have been deemed of sufficient importance as statistical facts to justify a statute making it compulsory on all officiating clergymen to register the burials in which they take part; and a small fee is imposed by statute on the person having charge of the matter. This duty was imposed on the clergy in 1812.[1] And a like duty is imposed in respect to the burial grounds and cemeteries in private hands.[2] Such register book is the property of the parish, though kept by the minister.[3] So important is it to secure accuracy and regularity in the register of deaths, that no clergyman can lawfully bury a dead body, without first receiving a copy of the registrar's certificate or coroner's certificate; or if he does, he must immediately send notice to the registrar of the district of the fact.[4]

When a person dies in a house, it is the duty of the nearest relatives, whether by blood or marriage, then present, or attending during the last illness, to give to the registrar of deaths for the district, the necessary particulars within the five days next following the death; or notice at least in writing, accompanied with a medical certificate of the cause of death, sent within fourteen days.[5] If these relatives make default, then it is the duty of every other relative dwelling in the same subdistrict to supply the information; and if they also make default, then it is the duty of every person present at the death, and of the occupier of the house, in which the death occurred, and next of every inmate of the house, and lastly, of the person causing the body to be buried, to inform the registrar of such death.[6] If on the other hand, a death occurs not in a house, or if a dead body is found not in a house, it is the duty of every relative who knows of the death to give the particulars to the registrar; and in default of such relatives discharging the duty, then every person present at the death, or finding, or taking charge, or causing the burial of the body, is to give the information within five days.[7]

Duty to give information to registrar as to death.—Any of the persons whose duty it is to furnish information to the

[1] 52 Geo. III c. 146; 6 & 7 Will. IV. c. 86. [2] 27 & 28 Vic. c. 97. [3] 6 & 7 Will. IV. c. 86, § 5. [4] Ibid. § 27. [5] 37 & 38 Vic. c. 88, §§ 10, 12. [6] Ibid. § 10. [7] Ibid. § 11.

registrar of a death, who wilfully refuses to answer any question put by the registrar, or fails to comply with any requisition of the registrar; and the person who is required in the first instance to give information of the death, that is to say, the nearest relative present at the death, shall, if the information is not duly given, be liable to a penalty of forty shillings, and, in default of payment, to one month's imprisonment.[1] It is also an offence punishable by a penalty of ten pounds, or upon indictment punishable by imprisonment to wilfully make or give false answers or information, or make false statements in order to have the same entered on the register.[2] Should none of the parties thus liable have sent the requisite information within fourteen days after the death, then the registrar may, by notice in writing, demand information from such person.[3] This he may require any time within twelve months after the death. In cases where a coroner's inquest is held on a dead body, it is the coroner's duty to give a certificate to the registrar containing the required particulars.[4] And as to deaths at sea, the captain or master of the ship is bound to record it in the log-book, and afterwards transmit the information as in case of births.[5] No fee is payable for the registration of a death at any time within twelve months.[6] But after that period a written authority from the Registrar-General is required before it can be registered; and a fee of ten shillings must also be paid.[7]

Not only is the fact of death deemed of sufficient public importance to be recorded, but the cause of death is also of great importance. Accordingly, in case of the death of any person who has been attended during his last illness by a registered medical practitioner, such practitioner is bound to give to the relative or other persons required to inform the registrar, a certificate stating, to the best of his knowledge and belief, the cause of death. The medical practitioner incurs a penalty of forty shillings for refusing to give this certificate, and the relative a like penalty for not delivering it to the registrar.[8]

The registrar of deaths is the same officer who registers births, and the system of registration is similar in both

[1] 37 & 38 Vic. c. 88, § 39. [2] Ibid. § 40. [3] Ibid. § 13. [4] Ibid. § 16. [5] Ibid. § 37; see *ante*, p. 341. [6] 37 & 38 Vic. c. 88. [7] Ibid. 2nd sched. [8] Ibid. § 20.

cases.[1] And the mode of obtaining certificates, and making these evidence, is also similar to the case of births.[2]

Before burial a certificate of death is required.—In the case of the burial of a body on which a coroner's inquest has been held, it is necessary for the undertaker to be provided with a coroner's certificate, and in other cases with the registrar's certificate, if registration of the death has been made. The relative is bound to furnish these documents to the undertaker under a penalty of forty shillings. And if they have not been delivered, the undertaker is bound under a penalty of ten pounds to give information to the registrar within seven days after the burial.[3]

Certificate on burial of still-born children.—Owing to obvious abuses, the burial of still-born children is prohibited, without a written certificate that the child was not born alive, signed by a registered medical practitioner, or without a declaration of some person present to that effect, and that a medical certificate could not be obtained. And if there has been an inquest, a coroner's order is required. Any person who permits a burial without these documents incurs a penalty of ten pounds.[4]

[1] See *ante*, p. 340. [2] See *ante*, p. 342. [3] 37 & 38 Vic. c. 88, § 17. [4] Ibid. § 18.

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THE END.

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ZEITSCHRIFT DES BERNER JURISTENVEREINS (*Juridical Journal of the Berne Association,*) (transl.).—"A thorough knowledge of the subject-matter cannot be denied to the author, and a breadth in his mode of handling it, which he was justified in assuming in view of the non-legal public. We Swiss are reminded by this book, that the State exists for citizens, and not citizens for the State; and that to allow the individual to be absorbed by the State—to allow the socialistic tendency, which expects all from the State, to gain the ascendency—is a barrier to all real progress."